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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 133.

THE GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. H. ELLIS, BY HIS NEXT FRIEND, H. W. ELLIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED JULY 9, 1894.

(15,628.)

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INDEX.

	Original.	Print.
Transcript from district court of Lampasas county	1	1
Caption	1	1
Plaintiff's amended account	1	1
Answer of defendant	2	2
Transcript from justice court	3	2
Appeal bond from justice court	4	3
Judgment, November 15, 1890	5	4
Appeal bond	6	5
Assignment of errors	7	6
Agreement of counsel as to appeal	8	6
Bill of costs	8	7
Clerk's certificate	9	7
Order of submission	10	8
Order referring cause to commission of appeals	10	8
Opinion of commission of appeals	10	8
Report of commission of appeals	17	13
Judgment of supreme court, February 2, 1892	17	13
Appellant's motion for rehearing	18	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 29, 1896.

	Original.	Print.
Opinion on motion for rehearing	20	14
Order granting motion for rehearing	20	15
Order transferring to Galveston	20	15
Order transferring to Austin	21	15
Order transferring to court of civil appeals	21	16
Opinion of court of civil appeals	21	16
Judgment of court of civil appeals, March 8, 1893	29	21
Appellant's motion for rehearing	29	21
Order overruling motion for rehearing, May 3, 1893	31	22
Petition for writ of error	32	23
Order of supreme court granting writ of error to court of civil appeals	36	26
Opinion of supreme court, May 10, 1894	37	26
Judgment of supreme court, May 10, 1894	41	29
Petition for writ of error	42	29
Writ of error	43	30
Citation	45	31
Acceptance of service of citation	45½	32
Bond on writ of error	46	32
Clerk's certificate	48	33
Brief of appellant in supreme court of Texas	49	34
Assignment of errors	53	36

1 *Caption.*

THE STATE OF TEXAS, }
County of Lampasas. }

At a term of the district court begun and holden at Lampasas, within and for the county of Lampasas, before the Honorable W. A. Blackburn, and ending on the 17th day of November, 1890, the following case came on for trial, to wit:

W. H. ELLIS, by His Next Friend, H. W. ELLIS, Pl'ff,
vs.
THE GULF, COLORADO & SANTA FE RAILWAY COMPANY, Def't. } No. 1272.

Plaintiff's Amended Account.

Filed in J. P. court Oct. 9, '90. Filed in dist. court Oct. 14, 1890.

W. H. ELLIS, by His Next Friend, H. W. ELLIS,
vs.
GULF, COLORADO & SANTA FE RAILWAY CO. } No. 1956. In Justice Court of Precinct No. 1, Lampasas County, Texas, Sept. Term, 1890.

Now comes W. H. Ellis, by his next friend, H. W. Ellis, leave of the court first having been had, and files this his amended account against the said defendant, The Gulf, Colorado & Santa Fe Railway Company, for the value of one colt that was struck and killed by the engine and cars of said railway company on or about the 12th of August, 1890, in Lampasas county, Texas, where the right of way of said railway company was not fenced, value of colt being $50.00.

And plaintiff represents that he presented said claim for said colt that was killed by said railroad company to the station agent of said railroad company, who was agent of said railroad company, at the station nearest where the said colt was killed, verified as required by section one, acts 21st legislature of the State of Texas,
2 which section was approved April 5th, 1889, and that said claim was not paid at the expiration of thirty days after its presentation to said station agent. Wherefore plaintiff claims ten dollars additional as att'y fees, as provided by said acts of said legislature, and asks the same to be taxed as costs in the case.

Indorsed: Filed Oct. 9th, 1890. A. D. Kent, J. P. prec't No. 1, L. Co., Texas. Filed Oct. 14th, 1890. J. P. Word, cl'k D. C., L. Co.

Answer of Defendant.

Filed in J. P. ct. Oct. 11, 1890. Filed in dist. court Oct. 14, 1890.

W. H. ELLIS, by His Next Friend, H. W ELLIS, *vs.* GULF, COLORADO & SANTA FE RAILWAY CO.	In Justice Court, Precinct No. 1, Lampasas County, Sept. Term, 1890.

Now comes the defendant in the above-entitled cause and, for answer to plaintiff's complaint, admits, 1st, that said plaintiff had one colt killed by the cars of defendant about August 12th, 1890, in the county of Lampasas; defendant admits that said colt was worth the sum of $50.00, and that plaintiff was damaged to that extent; defendant admits that plaintiff caused to be served upon this defendant an account of his said damages, verified by affidavit.

Defendant, for further answer to plaintiff's complaint, denies that plaintiff is entitled to an attorney fee of ten dollars or any other sum for that purpose, and prays the court to strike out of plaintiff's complaint said claim for attorney fee.

W. T. LEAGUE,
Att'y for Def't.

Endorsed as follows: Filed 11th Oct., 1890. A. D. Kent, J. P. pr. No. 1, Lampasas Co. Filed Oct. 14th, 1890. J. P. Word, cl'k D. C., L. Co.

3 *Transcript from Justice Court.*

Filed Oct. 14, 1890.

W. H. ELLIS, by His Next Friend, H. W. ELLIS, *vs.* THE GULF, COLORADO & SANTA FE RAILWAY CO.	No. 1956.

A. McFarland, Esq., plaintiff's attorney.
W. T. League, Esq., defendant's attorney.

Suit upon account for $60.00, of date ——; due, ——; interest legal; filed 23rd Sept., 1890; citation issued the 23rd day of Sept., 1890; returnable to Sept. term, 1890, and placed in the hands of Allen Lunsford.

Returned 23rd Sept., 1890; executed 23rd day of Sept., 1890; Sept. 29th, 1890, passed; Oct. 9th leave granted pl't'ff to file amended account.

Now, on this the 11th day of October, 1890, this cause coming on to be heard, came the parties, pl'ff and defendant, by their attorneys, and announced ready for trial, and the defendant, pleading by written answer filed herein on this day, admits as true all the

allegations in plaintiff's claim, except the sum of ten dollars prayed for as att'y's fee, and asks that this item be stricken out; and no jury having been demanded, the issues, as well of fact as of law, were submitted to the court, and after hearing the pleadings, the evidence, and the argument of counsel the court is of opinion that the defendant is justly indebted to pl't'ff in the sum of sixty dollars.

It is therefore considered, ordered, and decreed by the court that the pl'ff, W. H. Ellis, by his next friend, H. W. Ellis, do have and recover of and from the Gulf, Colorado & Santa Fe Railway Company the sum of sixty dollars, with interest thereon from this date at the rate of eight per cent. per annum, and all cost in this behelf expended, for which let execution issue.

A. D. KENT,
J. P. Prec't No. 1, Lampasas Co., Tex.

4 STATE OF TEXAS, }
County of Lampasas. }

I, A. D. Kent, justice of the peace, do hereby certify that the above and foregoing is a true and correct transcript of the entries on my docket on page 249, in the cause of W. H. Ellis, by his next friend, H. W. Ellis, *vs.* The Gulf, Colorado & Santa Fe Railway Company.

Witness my hand this the 14th day of October, A. D. 1890.

A. D. KENT,
Justice Peace Precinct No. 1, Lampasas County, Texas.

No. 1956.

Filed Oct. 14th, 1890.

J. P. WORD,
Cl'k D. C., L. Co.

Appeal Bond from Justice Court.

Filed in just. court Oct. 11, 1890. Filed in dist. court Oct. 14, '90.

In the Justice's Court of Precinct No. 1.

Before me, A. D. Kent, Esq., a justice of the peace in and for the county of Lampasas, State of Texas.

W. H. ELLIS, by His Next Friend, H. W. ELLIS, Plaintiff, }
versus } No. 1956.
GULF, COLORADO & SANTA FE RAILWAY COMPANY, Defendant. }

Whereas H. W. Ellis, as next friend of W. H. Ellis, the plaintiff, recovered a judgment against The Gulf, Colorado & Santa Fe Railway Company, the defendant, in the above entitled and numbered cause on the 11th day of October, A. D. 1890, before A. D. Kent, Esq., a justice of the peace in and for precinct No. one, in the county of Lampasas, State of Texas, for the sum of ($60.00) sixty dollars, with interest thereon from this date at the rate of 8 per cent. per

annum, besides costs of suit, from which judgment the said Gulf Colorado & Santa Fe Railway Company has appealed to the district court of Lampasas county, State of Texas:

Now, therefore, the said Gulf, Colorado & Santa Fe Rail-
5 way Company, as principal, and W. T. League and J. W. Townsen, as sureties, acknowledge themselves bound to pay to the said H. W. Ellis, as next friend of W. H. Ellis, the sum of ($120.00) one hundred and twenty dollars, conditioned that the said Gulf, Colorado & Santa Fe Railway Company shall prosecute said appeal to effect and shall pay off and satisfy the judgment which may be rendered against the said Gulf, Colorado & Santa Fe Railway Company on such appeal.

Dated at Lampasas this 11th day of October, A. D. 1890.

THE GULF, COLORADO & SANTA FE R'Y CO.,
By W. T. LEAGUE, *Att'y for said Co.*
W. T. LEAGUE.
J. W. TOWNSEN.

(Endorsed as follows:) Approved 11th October, 1890. A. D. Kent, J. P. pr. 1, Lampasas Co., Texas. Filed 11th October, 1890. A. D. Kent, J. P. pr. No. 1, Lampasas county, Texas. Filed in D. C. Oct. 14th, 1890. J. P. Word, cl'k D. C., L. Co.

Judgment of the District Court.

Nov. 15th, 1890.

W. H. ELLIS, by His Next Friend, H. W. ELLIS, *vs.* GULF, COLORADO & SANTA FE RAILWAY COMPANY.	1272. In the District Court of Lampasas County, Tex., Nov. Term, 1890.

Now, on this the 15th day of November, 1890, this cause being regularly reached on the docket and coming on to be heard, and no jury being demanded by either the plaintiff or defendant, the matters of law as well as fact were submitted to the court without the intervention of a jury; and the court, after hearing the pleadings in said cause and evidence and argument of counsel, is of the opinion that the plaintiff, W. H. Ellis, by his next friend, H. W. Ellis, ought to recover the sum of fifty dollars, with 8 % interest from
6 the 11th day of October, 1890, and ten dollars attorney fees. It is therefore considered, ordered, adjudged, and decreed by the court that the plaintiff, W. H. Ellis, by his next friend, H. W. Ellis, do have and recover of and from the defendant, The Gulf, Colorado & Santa Fe Railway Company, a corporation duly incorporated under the laws of the State of Texas, the said sum of fifty dollars, with 8 % interest per annum from the 11th day of October, 1890, and all costs of suit in this behalf expended.

And it is furthered ordered, adjudged, and decreed by the court

that the plaintiff, W. H. Ellis, by his next friend, H. W. Ellis, do have and recover of and from the defendant, The Gulf, Colorado & Santa Fe Railway Company, a corporation duly incorporated under the laws of the State of Texas, the further sum of ten (10) dollars as attorney fees, for all of which let execution issue.

And the defendant in open court excepts to so much of said judgment as allows ten dollars as attorneys' fee, and in open court gives notice of appeal to the supreme court of the State of Texas.

Appeal Bond.

Filed Nov. 20th, 1890.

W. H. ELLIS, by His Next Friend, H. W. ELLIS, *vs.* GULF, COLORADO & SANTA FE RAILWAY COMPANY.	No. 1272. In District Court of Lampasas County.

Whereas in the above numbered and entitled cause, pending in the district court of Lampasas county, State of Texas, and at a regular term of said court, to wit, on the 15th day of November, A. D. 1890, the said W. H. Ellis, by his next friend, H. W. Ellis, recovered judgment for the sum of sixty dollars, with interest thereon from the 11th day of October, 1890, at the rate of 8 % per annum, and all costs of suit, from which judgment the said Gulf, Colorado & Santa Fe Railway Company has taken an appeal to our supreme court of the State of Texas, and desires to suspend
7 the execution of said judgment during the pendency of said appeal:

Now, therefore, we, the said Gulf, Colorado & Santa Fe Railway Company, as principal, and —— ——, as sureties, acknowledge ourselves bound to pay to the said W. H. Ellis the sum of two hundred ($200.00) dollars, conditioned that the said Gulf, Colorado & Santa Fe Railway Company shall prosecute its appeal with effect, and, in case the judgment of the said appellate court shall be against it, that it shall perform its judgment, sentence, or decree and pay all such damages as said court may award against it, the said Gulf, Colorado & Santa Fe Railway Company.

Witness our hands this 20th day of November, 1890.

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
By W. T. LEAGUE, *Att'y.*
J. W. TOWNSEN.
N. O. REYNOLDS.

Approved and filed Nov. 20th, 1890.

J. P. WORD,
Clk D. C., L. Co.

Assignment of Errors.

Filed Nov. 25, 1890.

W. H. ELLIS, by His Next Friend, H. W. ELLIS, *vs.* THE GULF, COLORADO & SANTA FE RAILWAY CO.	1272.	In the District (Court), Lampasas County, Texas, Nov. Term, 1890.

Now comes the defendant in the above entitled and numbered cause and assigns the following as error committed by the court in the trial of the above cause:

1st. The court erred in finding judgment in favor of plaintiff for ten dollars attorney fees, because the act of the legislature authorizing the recovery of attorney fees in certain cases, being an act entitled "An act to regulate the presentation and collection
8 of personal services or labor or for damages or for overcharge on freight against railway corporations doing business in this State in case- where the amount claimed does not exceed fifty dollars, and to fix the measure of damages reasonable in certain of such cases," and known as house bill No. 307 and being section one of chapter 107, approved April 5th, 1889, page 131 of the Acts of 1889, is unconstitutional because the same is in violation of section 19, bill of rights, and because the same is in violation of section 56 of article three of the constitution of the State of Texas.

J. W. TERRY &
W. T. LEAGUE,
Att'ys for Defendant.

Filed Nov. 25th, 1890.

J. P. WORD,
Cl'k D. C., L. Co.

Agreement of Counsel.

Filed Nov. 25, 1890.

W. H. ELLIS, by His Next Friend, H. W. ELLIS, *vs.* THE GULF, COLORADO & SANTA FE RAILWAY CO.	In the District Court of Lampasas County.

In the above cause, appealed from Lampasas county to the supreme court, it is agreed by counsel for both appellee and appellant that the appeal be sent to the Galveston term of the supreme court of the State of Texas.

J. W. TERRY AND
W. T. LEAGUE,
Att'ys for The Gulf, Colorado & Santa Fe R'y Co, Appellant.
A. McFARLAND,
Attorney for Appellee.

Filed November 25th, 1890.

J. P. WORD,
Cl'k D. C., L. Co.

Bill of Costs.

W. H. ELLIS, by Next Friend, *vs.* G., C. & S. F. R'Y Co. } # 1272. In District Court, Lampasas County, November Term, 1890.

Clerk's Fees.

	Filing record.....	50
9	Docketing	20
	Ent'r'g order, .75; appearances, .30	1 05
	Ent'r'g judgment, .75; filing (5), .75.....	1 50
	Taking & app. appeal bond.....	1 50
	Writing transcript.....	4 00
	Taxing costs	25
		$9 00

Justice Court Costs.

J. P. fees	3 25
Const.	70
Total.....	$3 95
Cl'k's forw'd.....	9 00
Total.....	$12 95

I, J. P. Word, clerk of the district court of Lampasas county, hereby certify that the above is a true bill of costs in the above-styled cause.

Witness my hand and the seal of said court, at Lampasas, Dec. 3rd, 1890.

[L. S.]

J. P. WORD,
Cl'k D. C., L. Co.

Filed Dec. 3rd, 1890.

J. P. WORD,
Cl'k D. C., L. Co.

THE STATE OF TEXAS, }
Lampasas County. }

I, J. P. Word, clerk of the district court of said county, do hereby certify that the foregoing 12 and a fraction pages contain a true transcript of all the proceedings had in cause of W. H. Ellis, by his next friend, *vs.* The Gulf, Colorado & Santa Fe R'y Co., No. 1272.

Given under my hand and the seal of said court, at Lampasas, Texas, Jan. 31st, 1891.

[SEAL.]

J. P. WORD,
Cl'k D. C., L. Co.

Indorsed: No. 3072. Gulf, Colorado & Santa Fe R'y Co., appellant, *vs.* W. H. Ellis, by next friend, H. W. Ellis, appellee. From the district court of Lampasas county. Applied for by W. T. League, attorney for appellant, on the 25th day of November, 1890, and delivered to W. T. League on the 31st day of January, 1891. J. P. Word, clerk of the district court of Lampasas county. Filed in supreme court, at Galveston, the 13th day of February, 1891. D. D. Atchison, clerk. Filed in commission of appeals, at Galveston, Dec. 26, 1891. D. D. Atchison, clerk. No. 8139. Filed in

supreme court, at Austin, April 2, 1892. No. 143. Filed in court of civil appeals Oct. 3, 1892. Will L. Vining, clerk 3rd supreme judicial district. No. 44. Filed in supreme court July 20, 1893. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

10 G., C. & S. F. R'y Co., Appellant, *vs.* W. H. Ellis, Appellee. } No. 3072. Appeal from Lampasas County.

Order of Submission.

March 10, 1891.—Submitted on briefs for appellant.

Order Referring Cause to Commission of Appeals.

December 18, 1891.—It is ordered by the court that this cause be referred to the commission of appeals for their examination and report thereon to this court.

Opinion of Commission of Appeals.

Filed February 1, 1892.

The Gulf, Colorado & Santa Fe R'y Co., Appellant, *vs.* W. H. Ellis, by Next Friend, H.W. Ellis, Appellee. } Nos. 243, 3072. Appeal from Lampasas County.

W. H. Ellis, by next friend, H. W. Ellis, brought this suit in the justice court of precinct No. 1, in Lampasas county, against the appellant on an account for $50.00, the value of a certain colt killed by appellant's engine and cars on August 12th, 1890. It was alleged by appellee that this claim, verified by affidavit, had been presented to appellant's station master nearest the place where the colt was killed, according to the requirements of the act of April 5th, 1889, and that the amount was not paid at the expiration of 30 days after such presentation. Wherefore ten dollars, attorneys' fees, provided by said act upon the happening of *of* this contingency, *was* claimed — appellee. Answer admitted the correctness of the claim for stock killed, but denied its liability for the attorneys' fees. Judgment was rendered for the amount claimed. On appeal to the district court judgment was rendered for the same amount. This appeal is from that judgment.

The only question in this case involves the validity of an
11 act of the legislature approved April 5th, 1889, entitled "An act to regulate the presentation and collection of personal services or labor or damages or for overcharge on freight against railway corporations doing business in this State in cases where the amount claimed does not exceed $50.00, and to fix the measure of damages recoverable in certain of such cases.

SECTION 1. Be it enacted by the legislature of the State of Texas: That after the time when this act shall take effect any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight or claims for stock killed on injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50.00, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court and if he shall finally establish his claim and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10.00, to be assessed and awarded by the court or jury trying the issue."

The validity of this law is assailed on the ground that it is in violation of section 56, article 3, of the constitution of Texas, which prohibits the legislature from passing any special law
12 providing for or changing the methods for the collection of debts or the enforcing of judgments. It is also in violation of the general clause of such section, which prohibits the legislature from passing a special law in all cases where a general law could be made applicable, and is also violative of the 19th section of the bill of rights, which provides that "no citizen of this State shall be deprived of life, liberty, or property, privileges or immunities, or in any manner disfranchised, except by due course of the law of the land."

It has been adverted to as a remarkable fact by one of the judges of the Supreme Court of the United States that although this restrictive provision in the Constitution upon the General Government has existed for more than a century in that instrument, it has been rarely invoked in its application to that Government. While, on the other hand, it has only constituted a part of the constitution for a few years in its restraint upon the power of the States, the cases have been numerous in the Federal courts where those tribunals have been urged to declare that State legislatures have deprived their citizens of property, &c., without due process of law. Abundant evidence, it is said, exists indicating that there is a strange misconception of the scope of this provision in the 14th amendment. (Davidson *vs.* New Orleans, 6 Otto, 97 Ebsey; 6 Myer's Federal Decisions, page- 701–'2.)

After volumes written and spoken on this subject with a view to the exposition of these phrases, no general definition of them has been found which will cover every case.

"When the law of a State imposes any charge or burden upon property for the public use, whether for the whole State or for a limited portion thereof, and the laws provide a mode of confirming or contesting such charge in the ordinary courts of justice with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the
13 judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however objectionable it may be otherwise." (*Id.*)

The full significance of these phrases is said to be that statutes which would deprive a citizen of the rights of person or property without a regular trial, according to the course and usage of the common law, would not be the law of the land.

They were intended to protect the individual against the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice.

"Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms established for the protection of private rights."

"Such an exercise in each particular case of the powers of the Government as the settled maxims of the law permit and sanction and under safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

None of these principles (which have become so familiar and are so deeply impressed on the legal mind that the citation of authorities in their support is unnecessary), can it be said, we think, are violated by the statute under consideration.

It makes ample provision for a trial and adjudication upon the merits of the claim for stock killed, in accordance with the forms & established usages for the protection of private rights, and prescribes a safeguard in the requirement that an attorney shall be in fact employed before the cost therefor shall be taxed, not found in other cases. This act "hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." Since the Dartmouth College case these have been the recognized tests for determin-
14 ing whether property or rights have been taken without "due process of law" or in accordance with "the law of the land."

There is nothing in the "able and interesting opinion" in Taylor *vs.* Porter, 2 Hill, 140, to which we may not assent without conflicting with the views entertained by us on the question now before us.

In that case the power of the legislature of the State of New York to authorize a private road to be laid out over the land of a person without his consent was held to be unconstitutional. Private property, it was said, could not be taken for public use without just compensation therefor; and the power of the legislature to transfer or take the property of one person for the use or benefit of another was repudiated, as it could not be taken without due process of law.

The want of analogy between that case and the present is too obvious to require discussion, nor do we believe that the objection that the act is a special law and obnoxious because it is applied to a class of citizens only is well founded.

To make a statute a public law of general application it is not essential that it should extend even to all parts of the State. It has been held sufficient if it applies to all persons within the limits defined by the act. Cooley Const. Lim., p. 488, note 2.

Laws may be extended to all citizens or be confined to particular classes, as, for example, bankers, minors, traders, and the like.

"The power that legislates for the State, it is said, must determine whether its rules shall extend to all of its citizens or a class of them only" (Cooley on Const. Lim., p. 488). The business of common carriers is referred to as requiring special statutory regulations for the general benefit. If otherwise unobjectionable these laws are only required to be general in their application to them. *Id.*

Of the policy and propriety of such laws the legislative department alone must determine. It has been held that a statute
15 is general and uniform in its operation when it affects equally all brought within the relations and circumstances provided for, although it may not operate on every citizen (3 Am. & Eng. Encypd., page 697). We are of opinion that the act in question does not belong to that class of special laws the legislature is prohibited from the passage of by the constitution of our State. If, however, these views are correct, we are confronted with appellant's proposition, to the effect that if the act is not prohibited by any special constitutional mandate "it is so discriminatory in its character, being directed against one class of citizens only, and is so opposed to the principles of republican government that it cannot be presumed that the people intended to have conferred the power on the legislature to pass it."

The ablest and most conservative writers on constitutional law seem to entertain grave doubts as to the wisdom and propriety of the judicial department venturing upon the dangerous ground of declaring a statute void because it is unjust or oppressive or is supposed to affect the natural rights of the citizen, because it is violative of the fundamental principles of republican government, unless it appears that these principles are placed beyond legislative control by the terms of the Constitution.

This is founded on the reason that these principles are so susceptible to the varying demands growing out of public necessity and expediency that they cannot always be incorporated in the Constitution; and it is only generally where they have found expression in that instrument that the "principles of republican government" constitute a guide for our action or restraint on legislative power.

Numerous illustrations are given by Judge Cooley of the legislative disregard and invasion, in a restricted sense, of what may be termed in the abstract "republican principles," among which he cites the imposition of taxation without representation, the
16 interference by police regulations in local affairs, &c. *Id.*, 205–'6.

We are not able to see that the principles invoked with ability in appellant's brief are violated by the act under consideration, nor do we think the cases discussed so fully by him are decisive of the question before us. The question before the court in the case of Durkee *vs.* City of Janesville, 28 Wis., 464, a case relied on by appellant, was whether a law of that State which provided that no costs should be recovered against the city of Janesville in an action commenced by the city to set aside any tax assessment or deed or to prevent the collection of taxes, &c., in said city.

This act was there held to be void because it was not within the proper scope of the legislative power to exempt by name corporations from the operation of general laws, providing that the prevailing party should recover his costs. The difference between the question in that case and that before us is too obvious to require anything further than the statement of the questions respectively. It has been held in this State *in* that it is the statutory duty of a railroad to fence its track in those places where it can properly be done. Railway *vs.* Cock, 64 Tex., 151; Railway Co. *vs.* Dunham, 68 Tex., 261. Such being the construction of our statute (article 4245), this duty may be enforced by the penalty prescribed in the act assailed in this case providing for the assessment of reasonable attorney's fees against the company if the claim for the stock killed be established as therein provided, by judgment. A similar statute was held to be valid on this ground in the State of Illinois. Railway *vs.* Duggan, 109 Ill., 538. There is nothing to show that the stock killed, on which the claim in this case is founded, was not killed on the railroad at a point where it was not fenced. In addition to the views we have expressed, we believe it to be entirely within the power of the legislature to fix the measure of damages in certain cases which, it appears from the caption of the act,
17 was the purpose of the statute. This power has been heretofore exercised. Such damages are authorized as a compensation for injuries sustained by reason of "delay of rights," as was the case under article 1580, Pas. Dig., where the supreme court was authorized to assess, in cases of appeal, ten per cent. damages for delay. So, too, in cases of the trial of the right of property, on the failure of the claimant to establish his right similar damages were allowed to be assessed on the value of the property. R. S., art. 4840–'43. These articles, in so far as the power of the legislature is involved, are similar to the act in this case; but the power to regulate thus the measure of damages in this case has not been denied by the courts. Our opinion is that the act is not subject to the objections urged under the assignments of error presented by appellant, and we think the judgment should be affirmed.

HOBBY,
P. J. Sec. A, Com. of A.

Report of Commission of Appeals.

G., C. & S. F. R'y Co., Appellant, *vs.* W. H. Ellis, Appellee. } No. 243. Appeal from Lampasas County.

February 1st, 1892.—"This cause having been referred to us by the supreme court for our examination and report thereon, and we having determined as the proper disposition of the same that the judgment of the court below ought to be affirmed, it is therefore ordered that the clerk of this court transmit forthwith to the supreme court the synopsis of the case and the opinion filed by us, together with the record and a certified bill of the costs which have accrued herein."

Indorsed: Copy of order of commission of appeals at Galveston. Filed in supreme court, at Galveston, February 2, 1892. D. D. Atchison, clerk.

Judgment of Supreme Court.

G., C. & S. F. R'y Co., Appellant, *vs.* W. H. Ellis, by Next Friend, H. W. Ellis, Appellee. } No. 3072. Appeal from Lampasas County.

This cause having been heretofore referred to the commission of appeals for their examination, and they having certified to
18 this court their report and opinion, affirming the judgment of the court below, and said report having been examined and their opinion adopted, it is therefore adjudged, ordered, and decreed that said judgment be in all things affirmed, and that the appellee, W. H. Ellis, by next friend, H. W. Ellis, recover from the appellant, The Gulf, Colorado & Santa Fe Railway, and its sureties, J. W. Townsen and N. O. Reynolds, the amount adjudged below and all costs in this behalf incurred, and that this decision be certified below for observance.

Appellant's Motion for Rehearing.

In the Supreme Court of Texas, Galveston Term, 1892, 5th Assignment.

Gulf, Colorado & Santa Fe Railway Company, Appellant, *vs.* W. H. Ellis, by Next Friend, H. W. Ellis, Appellee. } No. —. Appeal from Lampasas County.

Now comes the appellant and moves the court to grant a rehearing in this cause on the following grounds:

First. The court erred in not holding that the act of the legislature, under which a recovery of ten dollars attorney's fees was had

was in violation of section 2 of the bill of rights of the constitution of Texas, which says that the faith of the people stands pledged to the preservation of a republican form of government, and in violation of section 3 of the said bill of rights, which says that all free men when they form social compact have equal rights, and in violation of section 19 of the bill of rights, which provides that no citizen in this State shall be deprived of life or property, privileges or immunities, or in any manner disfranchised except by due course of the law of the land; and erred in not holding that the said act was in conflict with section 13 of said bill of rights, which provides that all courts shall be open to every person for an injury done him in his lands, goods, or personal reputation, — shall have remedy by due course of law.

Second. The court erred in not holding that the act of the
19 legislature in question was in violation of section one, article 14, of the Constitution of the United States, which reads: "The law shall not in any State deprive any person of life, liberty, or property without due process of law, or deny to any person in its jurisdiction equal protection of the law."

Third. The court erred in not holding that the act of the legislature in question is so discriminatory in its character that even if it be not prohibited by any specific provisions of the constitution of the State, and so opposed to the principles of republican government (which the Constitution pledges the faith of the people to maintain), that it cannot be presumed that the people intended to confer power on the legislature to pass it.

Fourth. The court erred in not holding that the act in question is in violation of section 6, article 3, of the constitution of Texas, which prohibits the legislature to pass any special law providing for or changing the methods for the collection of debts or the enforcement of judgments, and that it is also in violation of the general clause of such section which prohibits the legislature from passing any special law in all cases where a general law could be made applicable.

Appellant represents that W. H. Ellis and his next friend, H. W. Ellis, reside in the county of Lampasas, State of Texas, and prays that service of this motion be had upon them.

A printed argument will be filed in support of this motion.

J. W. TERRY,
Counsel for Appellant.

20 *Opinion on Motion.*

GULF, COLORADO & SANTA FE R'Y CO. *vs.* W. H. ELLIS, Next Friend. } No. 637, 3072. Appeal from Lampasas County.

The motion for rehearing in this cause will be granted and cause transferred to Austin; and in view of the importance of the question involved, A. McFarland, Esq., attorney for appellee, is requested to file brief on question whether the statute invoked in this

case is in violation of any of the provisions of the constitution of this State referred to in brief and printed argument filed for appellant.

STAYTON,
Chief Justice.

Indorsed: 3072. G., C. & S. F. R'y Co. *vs.* W. H. Ellis, next friend. Request for brief. Filed in supreme court, at Galveston, March 25, 1892. D. D. Atchison, clerk. Filed in court of civil appeals, third supreme judicial district of Texas, Oct. 3, 1892. Will L. Vining, clerk.

Order Granting Motion for Rehearing.

G., C. & S. F. R'y Co., Appellant, *vs.* W. H. ELLIS, by Next Friend, H. W. ELLIS, Appellee.	No. 3072. Appeal from Lampasas County.

March 25, 1892.—On this day came on to be heard motion of appellant for rehearing; and the same having been considered, it is ordered that said motion be granted and that the judgment rendered herein on February 2, 1892, be, and the same is, set aside and the case reinstated on the docket; and it is further ordered that appellee file brief, and that the case be transferred to Austin.

Order Transferring to Galveston.

G., C. & S. F. R'y Co., Appellant, *vs.* W. H. ELLIS, by Next Friend, H. W. ELLIS, Appellee.	Appeal from Lampasas County.

June 25, 1892.—Transferred to Galveston.

21 *Order of Supreme Court.*

June 25, 1892.—It is ordered that all cases undecided at the Tyler and Galveston branches of the supreme court be transferred to the supreme court at Austin, and that the clerks at the branches from which said causes are transferred transmit the transcript in such causes to the clerk of the court at this place at some time after the first of September next and before the tenth of that month, with copies of all orders heretofore made in such cases and certified copies of all bills of cost.

Received and filed in supreme court, at Austin, September 3, 1892.

Order Transferring to Court of Civil Appeals.

G., C. & S. F. R'y Co., Appellant,
vs.
W. H. Ellis, by Next Friend, Appellee. } No. 8783. Appeal from Lampasas County.

October 3rd, 1892.—It is ordered that this cause be transferred to the court of civil appeals for the third supreme judicial district.

Opinion of the Court of Civil Appeals. Filed March 8th, 1893.

Gulf, Colorado & Santa Fe Railway Company
vs.
W. H. Ellis. } No. 143. Appeal from Lampasas County.

Opinion.

This case was decided by the commission of appeals February 1st, 1892, and the judgment of the lower court affirmed.

A rehearing was granted by the supreme court, upon motion of appellant, without any expression of opinion by the court upon the questions at issue. We are therefore required to review the entire case.

The case is properly stated in the former opinion and need not be repeated. We adopt that statement as a statement of the facts.

22 The question to be decided is the constitutionality of the act of April 5th, 1889, which allows recovery by plaintiff of an attorney's fee not to exceed ten dollars in case of recovery against a railway company upon a claim for stock killed or injured by the train, which claim has been duly presented to the agent of the company, verified by affidavit, and not paid at the expiration of thirty days after such presentation. The attorney's fee can be collected only in case plaintiff establish his claim and is to be assessed and awarded by the court or jury trying the issue and cannot exceed ten dollars. The fee is allowed only in case the claim for damages does not exceed $50.00.

The act reads as follows:

"An act to regulate the presentation and collection of personal services or labor or for damages or for overcharge on freight against railway corporations doing business in this State in cases where the amount claimed does not exceed $50, and to fix the measure of damages recoverable in certain of such cases.

"Section 1. Be it enacted by the legislature of the State of Texas: That after the time when this act shall take effect any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight or claims for stock killed or injured by the train of any railway

company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."

23

The act is assailed upon the ground that it is in violation of sec. 56, art. 3, of the State constitution, which provides "that the legislature shall not, except as otherwise provided in this constitution, pass any local or special law * * * providing or changing methods for the collection of debts or the enforcing of judgments;" that it is in violation of sec. 19 of the bill of rights, declaring that "no citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by due course of law;" also of sec. 2 of the bill of rights, which pledges the faith of the people of Texas "to the preservation of a republican form of government;" also of sec. 13 of the bill of rights, requiring all courts to be open, and that every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law; and also of sec. 1, article 14, of the Constitution of the United States, providing that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Counsel for appellant filed an able and exhaustive brief and argument in support of his position, which we have carefully considered. We have, however, reached a conclusion different from that argued by him, which we must present as briefly as can be done.

24

The principal objection to the act is that it discriminates unjustly against railroads, or is obnoxious as class legislation, and deprives them of property rights without due process of law.

There is an irreconcilable conflict of opinion in the cases and books upon both of these questions. All are agreed that the provisions of the Constitution guaranteeing equal rights to all citizens before the law can be violated by special acts of the legislature, but there are a variety of opinions as to what constitutes such violation.

What is unconstitutional class legislation in the opinion of some courts is considered legitimate by other courts.

It is admitted that there is and must be class legislation, but where the line should be drawn when it becomes unjustly discriminatory is the trouble.

There is a mass of legislation—in fact, the most of it—that is in one sense class legislation. No one questions its propriety or constitutionality.

The law of minors, of married women, husband and wife, parent and child, master and servant, of partnerships, of corporations, of merchants, and other divisions of society and occupations is class legislation, but it is not invalid. Legitimate class legislation is based upon the necessities of society, of commerce, and business, and it is the duty and privilege of the law-making power to recognize classes and enact laws for their government and protection; not a class distinguishable by wealth, family, or title, but by the necessities of the people and the occupations deemed useful and promotive of the general public welfare. The legislature always has the power to make these distinctions, and it is its province to regulate their rights and duties as related to their membership and as related to the public. Here an important principle is laid down in government that class legislation is permitted where all members of a class are equally protected and have equal rights and obligations. There is no violation of equality of rights before the law in this.

"Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affect alike all persons similarly situated, is not within the amendment" (14 amendment to the Const. U. S.). The foregoing quotation found in Barbier *vs.* Connolly (113 U. S.) expresses the principle that runs through all the authorities treating of this subject. The trouble is in the application of the principle. Railway *vs.* Beckwith, 129 U. S., 26, and authorities cited.

In our opinion the provisions of the constitution of this State and of the United States cited by appellant were not intended to take from the legislature the power to classify citizens of the State according to their avocations and enact laws beneficial to them or restraining them in acts that would abridge the rights of the public, so long as all of a class—that is, all in the same condition—are equally and impartially effected.

Cooley says: "The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a class of citizens only. * * * The legislature may also deem it desirable to prescribe peculiar rules for several occupations and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages when it would be im-

practicable or impolitic to do the same for persons engaged in other employments. If the laws be not otherwise objectionable,
26 all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and policy the legislature must judge." Cooley Const. Law, 480–481.

No one doubts that a statute discriminating among persons of the same class or locality would be invalid. The legislature cannot select one of a class—one merchant, one railroad, one bank, or one person—and prescribe burdensome rules for his or their government that would not apply to all of the same class and in the same condition.

Occupations have often been the subject of direct legislation and the persons or corporations engaged in them prohibited from certain acts that were lawful for other citizens, and burdens have been imposed upon named occupations from which others were exempt, and such laws have been declared constitutional by the highest courts as not objectionable class legislation or a taking of property without due process of law. State *vs.* Loomis (Mo. Su. Ct.), 20 S. W. Rep., 332, and authorities cited; Railway *vs.* Humes, 115 U. S., 512; Railway *vs.* Mackey, 127 U. S., 205; Welch *vs.* Chicago R'y Co., 53 Iowa, 632; Ill. Cent. R'y Co. *vs.* Crider, 19 S. W. R., 618 (Tenn.); Budd *vs.* New York, 143 U. S., 517 *et seq.* and cases cited; see 68 Ala., 58; Railway *vs.* Werrington, 92 Ill., 157. This case overrules R. R. Co. *vs.* Boty, 6 Neb., 37; Railway Co. *vs.* Harry, 63 Tex. 256; Railway Co. *vs.* Dwyer, 75 Tex., 580; Railway Co. *vs.* State, 61 Tex., 343; Humes *vs.* Railway Co., 82 Mo., 224; Crowin *vs.* Ward, 35 Cal., 199; Wilder *vs.* Maine Central, 65 Me., 338; Railway Co. *vs.* Riblet, 66 Penn., 166; Spealman *vs.* Railway Co., 71 Mo., 434; Rodemacher *vs.* Railway Co., 41 Iowa, 300; Shaffert & Munn *vs.* Mining Co., 55 Md., 74; Railway Co. *vs.* Duggan, 109 Ill., 537; State *vs.* Stevenson, 109 N. C., 731; State *vs.* French, 109 N. C., 772; Fred. Obery case, 21 Oregon, 406; Bank *vs.* Cooper, 2 Yerger, 599, 24 Am. Dec., 517 and 523; People *vs.* City, 69 Me., 280; City
27 *vs.* Levy, 26 La., 671; R. R. *vs.* Morris, 65 Ala., 193; Zeigler *vs.* R. R., 58 Ala., 594; Wally's Heirs *vs.* Kenedy, 24 Am. Dec., 571; Holden *vs.* Jones, adm'r, 11 Mass; Lewis *vs.* Webb, 3 Maine, 326; Baggs Appeal, 43 Pa. St., 512; Millett *vs.* People, 117 Ill.; Durkee *vs.* City, 28 Wis., 464; 77 *id.*, 288; Wilder *vs.* Chicago R. R., 38 N. E. Rep., 288, Mich. case; 43 N. W. Rep., 1008; R'y Co. *vs.* Wilson, 19 S. W. Rep., 911.

In most of the cases where a penalty is allowed—double damages or attorney's fees—the railroad company is made liable upon condition that it has failed to fence its road, and the right of the legislature to act is referred to its police power. We are not prepared to say that the failure to fence under such statutes may not serve as a sufficient reason why the law would be valid, but the right of the legislature to act is based upon a principle deeper than the mere failure to fence the road. It lies in the fact that the public are interested in having protection against the hazardous business of

railroads; human life is endangered by great power and force employed in the business. Railroads are public carriers, carriers of passengers, whose safety depends upon the care exercised by the company's employees in operating this force. A collision of a passenger train with an animal of insignificant value might be attended with shocking results in loss of human life. A statute that would stimulate those engaged in such business to greater care would not be without legal foundation, whether it be accomplished by penalty or by requiring the road to be fenced. Either would be a means of accomplishing the same result, of lessening the danger to the travelling public. We think it within the constitutional power of the legislature to enact such a statute, and we think the power to so legislate specially as to railroads is found in the right of the legislature to classify the citizens of the State according to their occupations. All railroads are included in the act under consideration. There is no other occupation that can be similarly situated.
28 We do not think it is unconstitutional.

The objection that the law discriminates as to litigants is not well taken. The legislature certainly has the power to impose fines and forfeitures as a police regulation when it includes all persons within a class upon whom the statute can operate. All *qui tam* actions are of this character. The maximum of attorney's fee is fixed, and this may be reduced by the jury or the court trying the case, and it is provided that it can only be recovered in case the plaintiff is finally successful in the suit, and under another statute he cannot recover if the road be fenced and the company exercise ordinary care. R. S., 4245; R'y Co. *vs.* Warrington, 92 Ill., 159 & 160.

This case is not similar to that of Dillingham *vs.* Putnam, 14 S. W. R., 303, where our supreme court held *that* an act requiring supersedeas bond of receivers in case of appeal unconstitutional.

We do not deem it necessary to discuss every proposition made in the exhaustive brief and argument of counsel for appellant, or to review in this opinion the authorities cited by him. It is true that many of the cases used by him lay down doctrine opposed to the views we have expressed. We have examined the authorities presented and are firmly impressed that the part of the act assailed is constitutional. We only pass upon that part of it that belongs to this case. Our conclusion is that the judgment of the court below is correct and should be affirmed, and it is so ordered.

Affirmed.

COLLARD,
Associate Justice.

29 *Judgment of the Court of Civil Appeals.*

MARCH 8TH, 1893.

GULF, COLORADO & SANTA FE RAILWAY COMPANY
vs.
W. H. ELLIS, by Next Friend, H. W. ELLIS.

No. 143. Appeal from Lampasas County.

Opinion by Associate Justice COLLARD:

This cause came on to be heard on the transcript of the record, and the same having been inspected, because it is the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellee, W. H. Ellis, by his next friend, H. W. Ellis, do have and recover of and from the appellant, The Gulf, Colorado & Santa Fe Railway Company, and its sureties, J. W. Townsen and N. O. Reynolds, the amount adjudged by the court below, together with all costs in this behalf expended, both in this court and in the court below, and that this decision be certified below for observance.

Appellant's Motion for Rehearing.

Filed March 20th, 1893.

In the Court of Civil Appeals of Texas, Third Supreme Judicial District.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
W. H. ELLIS, by Next Friend, H. W. ELLIS, Appellee.

Appeal from District Court of Lampasas County.

Now comes the appellant and moves the court to grant it a rehearing in this case on the following grounds, to wit:

First. The court erred in holding that as applied to this particular case the act was constitutional, because to increase the vigi-
30 lance used by railroad companies in operating their trains, etc., because in such holding the court was legislating and not adjudicating, for the reason that the legislature never intended the act for any such purpose. Said ruling of the court is erroneous for the further reason that the legislature cannot, under the Constitution, prescribe a penalty without prescribing some means of escaping the penalty, which is not provided by this act.

Second. The court erred in failing to hold that the act of legislature which allows the attorney's fees in question was in violation of section 2 of the bill of rights of the constitution of the State of Texas, which says that the faith of the people of Texas stand- pledged to the preservation of a republican form of govern-

ment, and erred in failing to hold that said act is in violation of section 3 of the bill of rights of the constitution of the State of Texas, which says that all free men when they form a social compact have equal rights, and erred in not holding that the said act is in violation of section 19 of the said bill of rights, which provides that no citizen of this State shall be deprived of life, liberty, property, privileges, or immunities or in any manner disfranchised, except by due process of the law of the land.

Third. The court erred in failing to hold that the act of the legislature allowing attorney's fees is in violation of so much of section 1, art. 14, of the Constitution of the United States as reads, "Nor shall any State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

Fourth. The court erred in failing to hold that the act of the legislature of the State of Texas was in violation of that part of section 13 of the bill of rights of the Texas constitution which provides that all courts shall be open, and that every person for an injury done him in his land or his person or his reputation shall have remedy by due course of law.

Fifth. The court erred in failing to hold the act in ques-
31 tion was in violation of section 59, art. 3, of the constitution of Texas, which prohibits the legislature from passing any special laws providing for or changing the method for the collection of debts or the enforcement of judgments, and in failing to hold that the said act of the legislature violates the provision of the same section which prohibits local or special laws regulating the practice in judicial proceedings.

Appellant represents that the appellee, W. H. Ellis, and his next friend, H. W. Ellis, each and all reside in the county of Lampasas, State of Texas, and appellant prays that service of this motion be had on the said W. H. Ellis, and also upon H. W. Ellis, as next friend of said W. H. Ellis.

Respectfully submitted.

J. W. TERRY,
Counsel for Appellant.

Order Overruling the Motion for Rehearing, May 3, 1893.

THE GULF, COLORADO & SANTA FE RAILWAY COMPANY
vs.
W. H. ELLIS, by Next Friend, H. W. ELLIS.

No. 232. No. 143. Appeal from Lampasas County.

This day in this cause came on to be heard the motion for a rehearing, and, the same having been duly considered, it is ordered that said motion be, and the same is hereby, overruled, and that appellant, The Gulf, Colorado & Santa Fe Railway Company, and its sureties, J. W. Townsen and N. O. Reynolds, pay the costs of this motion.

32 In the Supreme Court of Texas, at Austin, Texas.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error, *vs.* W. H. ELLIS, by Next Friend, H. W. ELLIS, Defendant in Error.	No. —. Appeal from the District Court of Lampasas Co.

Petition for Writ of Error.

Now comes the Gulf, Colorado & Santa Fe Railway Company and petitions the supreme court of Texas to grant a writ of error in this cause, directed to the judges of the court of civil appeals for the third supreme judicial district of the State of Texas, at Austin, to revise a certain judgment rendered by the said court of civil appeals on the 8th day of March, 1893, which judgment affirmed the judgment of the district court of Lampasas county, Tex., rendered in this cause on the 15th day of November, 1890, in favor of the defendant in error, W. H. Ellis, against your petitioner for the sum of fifty dollars and ten dollars attorney's fees and all costs.

In support of this petition your petitioner, The Gulf, Colorado & Santa Fe Railway Company, represents that this cause was instituted in the justice court of Lampasas county to recover the sum of fifty dollars, value of a cow, and ten dollars, attorney's fee; that judgment was rendered in the said justice court against your petitioner for the sum of $50.00 and $10.00 attorney's fees, from which judgment an appeal was prosecuted to the district court of Lampasas county, the county court of that county being without civil jurisdiction, where the cause was tried *de novo* and judgment rendered against your petitioner as above stated, from which judgment an appeal was prosecuted to the supreme court of Texas; that this cause was afterwards transferred to the said court of civil appeals.

That the defendant, W. H. Ellis, and his next friend, H.
33 W. Ellis, each reside in the county of Lampasas, State of Texas.

Your petitioner shows that this court has jurisdiction hereof by virtue of article 1011 of the Revised Statutes of Texas, as amended by an act approved April 13th, 1892, and section 5 of an act approved April 13th, 1892, entitled "An act to organize the courts of civil appeals," etc., both of said acts being acts of the legislature of the State of Texas, being chapters 14 and 15, General Laws of the first-called session of 1892.

Your petitioner represents that this cause involves the validity and constitutionality of the statute of the State of Texas of April 5th, 1889, which is in substance as follows:

"An act to regulate the presentation and collection of personal services or labor or for damages or for overcharge on freight against railway corporations doing business in this State in cases where the amount claimed does not exceed $50, and to fix the measure of damages recoverable in certain of such cases.

"SECTION 1. Be it enacted by the legislature of the State of Texas: That after the time that this act shall take effect any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall
34 finally establish his claim and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not — exceed $10, to be assessed and awarded by the court or jury trying the issue."

The writ of error is prayed for on the following grounds:

First. The court of civil appeals erred in holding that, as applied to this particular case, the act was unconstitutional, because it might tend to increase the vigilance used by railroad companies in operating their trains, etc., because in such holding the court was legislating and not adjudicating, for the reason that the legislature never intended the act for any such purpose. Said ruling of the court is erroneous for the further reason that the legislature cannot under the constitution prescribe a penalty without prescribing some means for escaping the penalty, which is not provided by this act.

Second. The court of civil appeals erred in failing to hold that the act of the legislature which allows attorney's fees in question was in violation of section 2 of the bill of rights of the constitution of the State of Texas, which says that the faith of the people of Texas stand- pledged to the preservation of a republican form of government, and erred in failing to hold that said act is in violation of section 3 of the bill of rights of the constitution of the State of Texas, which says that all free men when they form a social compact have equal rights, and erred in not holding that the said act is in violation of section 19 of the said bill of rights, which provides that no citizen of this State shall be deprived of life, liberty,

property, privileges, or immunities, or in any manner disfranchised, except by due course of the law of the land.

35 Third. The court of civil appeals erred in failing to hold that the act of the legislature allowing attorney's fees is in violation of so much of section 1, art. 14, of the Constitution of the United States as reads, "Nor shall any State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

Fourth. The court of civil appeals erred in failing to hold that the act of the legislature of the State of Texas was in violation of that part of section 13 of the bill of rights of the Texas constitution which provides that all courts shall be open, and that every person for an injury done him in his land or his person or his reputation shall have remedy by due course of law.

Fifth. The court of civil appeals erred in failing to hold the act in question was in violation of section 56, art. 3, of the constitution of Texas, which prohibits the legislature from passing any special laws providing for or changing the method for the collection of debts or the enforcement of judgments, and in failing to hold that the said act of the legislature violates the provision of the same section which prohibits local or special laws regulating the practice in judicial proceedings.

Your petitioner further represents that it filed in the said court of civil appeals motion for rehearing on the same grounds as above stated, and its motion was by the said court of civil appeals overruled on the 3rd day of May, 1893.

Petitioner files herewith transcript, certified by the clerk of the said court of civil appeals, containing copies of the papers required by the statute and rules of this court, and files herewith copies of argument in support of motion for rehearing heretofore filed by your petitioner in the supreme court of the State of Texas and

36 which was transferred to the said court of civil appeals, and said argument shows that all the questions involved in this cause were properly presented in the said court of civil appeals, and prays that said argument be considered part of this petition.

Respectfully submitted.

J. W. TERRY,
Counsel for Pl'ff in Error.

Indorsed: No. 76. G., C. & S. F. R'y Co., plaintiff in error, *vs.* W. H. Ellis, by next friend, H. W. Ellis, defendant in error. Petition for writ of error. Filed in supreme court May 22, 1893. Chas. S. Morse, clerk.

Judgment of Supreme Court Granting Writ.

JUNE 19, 1893.

G., C. & S. F. R'y Co. vs. W. H. ELLIS, by Next Friend. } App. No. 76. From Lampasas County, Third District.

This day came on to be heard the application of the Gulf, Colorado & Santa Fe Railway Company for a writ of error to the court of civil appeals for the third supreme judicial district, and, the same having been duly considered, it is ordered that said application be granted and the writ of error issued as prayed for.

37 GULF, COLORADO & SANTA FE R'Y CO., Pl'ff in Error, v. W. H. ELLIS, by Next Friend, Def't in Error. } 44.

From the third supreme judicial district.

This is a suit instituted by the appellee, W. H. Ellis, by next friend, H. W. Ellis, against the appellant, in the justice court of precinct No. 1, Lampasas county, Texas, wherein by an amended account, filed October 9, 1890, the plaintiff charges, in substance, that on or about the 12th day of August, 1890, the appellant by its engines and cars killed a certain colt, the property of the appellee, of the value of $50. He further charges that he presented his claim, verified by affidavit, to the defendant's station master nearest the place where the colt was killed, according to the provisions of the act of 1889, and that the amount was not paid at the expiration of thirty days after the presentation of the claim; wherefore plaintiff claims $10 additional as attorney's fees, as provided by said act of the legislature.

The appellant filed an answer by which it, in substance, admitted the allegations in plaintiff's account, but denied that it was liable for attorney's fees, and moved the court to strike out plaintiff's claim for the same.

There was a judgment in the justice court for the sum of $50, with interest and attorney's fees, from which appellant prosecuted an appeal to the district court of Lampasas county. At the November term of the district court the same judgment was rendered in favor of the appellee, from which judgment the appellant prosecuted the appeal to this court. The defendant in open court excepted to so much of the judgment as allowed $10 attorney's fees, and in open court gave notice of appeal to the supreme court of the State of Texas. The judgment of the district court was affirmed by the court of civil appeals, from which this writ of error is prosecuted.

38 Plaintiff in error presents to this court the single question of the validity of the following act of the legislature, approved April 5th, 1889:

"An act to regulate the presentation and collection of personal services or labor or for damages or for overcharge on freight against railway corporations doing business in this State in cases where the amount claimed does not exceed $50, and to fix the measure of damages recoverable in certain of such cases.

"SECTION 1. Be it enacted by the legislature of the State of Texas: That after the time that this act shall take effect any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."

This act is assailed as being in violation of the first section of the fourteenth amendment to the Constitution of the United States, because it denies to the railroad companies the equal protection of the laws, and because it is in conflict with art. 1, sections 2, 3, 39 13, and 19, and art. 3, sect. 56, of our State constitution. Except that which is predicated upon sect. 2, art. 1, of our State constitution, all the objections were presented in the case of Union Cent. Life Ins. Co. *v.* Chowning, decided by this court today, and the propositions were all decided against the contention of plaintiff in error.

In enacting this law the legislature exercised the political power which by section 2, art. 1, is declared to inhere in the people, and the law in no manner infringes the pledge to preserve a republican form of government.

Plaintiff in error cites Vanzandt *vs.* Waddell, 2 Yerger, 260, as authority against the validity of this law, and also Janes *vs.* Reynolds, 2 T., 250, approving the former. As qualified by the last-named case, the doctrine announced in the former is unobjectionable and sustains this act as being a general law affecting alike all persons of that class in like conditions.

Wilder *vs.* R. R., 70 Mich., and Durkee *vs.* Janesville, 28 Wis., 464, rest upon a rule of construction which this court refused to

follow in Ins. Co. *vs.* Chowning. The cases of R. R. Co. *vs.* Morris, 65 Ala., 199, and R. R. Co. *vs.* Morse, 60 Miss., 646, cited, are based upon a construction of the constitutions of those States, the provisions of which are in the main the same as our own; but we believe that the construction given is not consistent with the well-settled rules established by our own court, sustained by the best authorities. Dow *vs.* Beidleman, 49 Ark., 455, and Burlington C. R. & N. R. Co. *vs.* Dey, 45 Am. Eng. R. R. Cases, sustain statutes which allow the recovery of attorney's fees in suits for damage on account of overcharges in freight rates by railroad companies, and Wortham *vs.* Kleimschmidt (Mont.), 30 Pac. Rep., 280, upholds a statute which gave attorney's fees in suits to foreclose liens in certain classes of claims.

Statutes permitting the recovery of attorney's fees in suits for the value of stock killed by railroad companies have been held by the courts of many of the States to be valid. (Peoria D. & E. R'y Co. *vs.* Duggan, 109 Ill., 537; Perkins *vs.* St. Louis & Iron Mountain R'y Co., 15 S. W. Rep., 320.)

It is true that in some of the cases, and we believe the greater number of them, the courts have sought to justify the exercise of this power as being a penalty to enforce the statutory duty to fence the tracks of railroads. Counsel for plaintiff in error seems to admit that upon this ground the statute might be sustained, but we cannot see that it is necessary to assign any particular reason for the exercise of constitutional power by a legislative body.

The act in question in this case embraces different classes of claims. It provides for attorney's fees in each of them upon the same conditions, without reference to the origin of the right. Some must arise out of contract, while other*wise* are for damages for torts committed. In each case the claimant must make affidavit to the amount of the claim and present it to the railroad company, allowing thirty days for investigation. Attorney's fees are not allowed except when suit is made necessary by refusal to pay, and then only in cases wherein an attorney is actually employed and the full amount claimed is recovered. It is clear that the attorney's fees are given to reimburse the plaintiff in the suit for the costs necessarily incurred in prosecuting the claim. If the claim is unjust to the full amount or in part, it is to be presumed that the court will not give judgment for plaintiff, and no attorney's fee can be recovered; if just, it can be paid, and no such liability will be incurred by the railroad company.

There is no error in the judgment of the district court nor in that of the court of civil appeals, and the judgments of both courts are affirmed.

T. J. BROWN,
Associate Justice.

Opinion delivered May 10, 1894.

41 *Judgment of Supreme Court.*

MAY 10, 1894.

G., C. & S. F. R'Y Co. vs. W. H. ELLIS, by Next Friend. } No. 44. From Lampasas County, Third District.

Opinion delivered by Associate Justice BROWN:

This cause came on to be heard on writ of error to the court of civil appeals for the third supreme judicial district, and the original transcript in said cause being before the court, as well as the transcript showing the proceedings had in said court of civil appeals, and these having been duly considered, because it is the opinion of this court that there was no error in the judgments of the said court of civil appeals and of the district court, it is therefore considered, adjudged, and ordered that said judgments be in all things affirmed; that the defendant in error, W. H. Ellis, by next friend, H. W. Ellis, do have and recover of and from the plaintiff in error, The Gulf, Colorado & Santa Fe Railway Company, and its sureties, J. W. Townsen and N. O. Reynolds, the amount adjudged below, together with all costs in this behalf expended in this court, in the court of civil appeals, and in the district court, and this decision be certified to the district court for observance.

42 In the Supreme Court of the State of Texas, at Austin.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error, vs. W. H. ELLIS, by Next Friend, Defendant in Error. } From Lampasas County, Texas.

Application for Allowance of Writ of Error.

To the Honorable J. W. Stayton, chief justice of the supreme court of the State of Texas:

Comes the Gulf, Colorado & Santa Fe Railway Company, by its attorney, J. W. Terry, and complains that in the records and proceedings, and also in the rendition of a judgment in a suit between The Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, and W. H. Ellis, by next friend, H. W. Ellis, defendant in error, in the said supreme court of the State of Texas, being the highest court of law or equity in the said State in which a decision could be rendered in said suit, and in which a final judgment was rendered against the said appellant on the 10th day of May, 1894, wherein was drawn in question the validity of a statute of the State of Texas, on the ground of its being repugnant to the constitution of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was

against the title, right, privilege, and exemption severally set up or claimed under the said clause of said Constitution, all of which appears from the records and proceedings in the said suit, manifest error hath happened, to the great damage of the Gulf, Colorado & Santa Fe Railway Company; wherefore the said Gulf, Colorado & Santa Fe Railway Company, by attorney, prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY,
Attorney for Gulf, Colorado & Santa Fe Railway Co.

June 1st, 1894.—Allowed by—
JOHN W. STAYTON,
Chief Justice.

Indorsed: The Gulf, Colorado & Santa Fe Railway Company *vs.* W. H. Ellis, by next friend, H. W. Ellis. Application for allowance of writ of error. Filed in supreme court of Texas June 4th, 1894. Chas. S. Morse, clerk.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Texas, holding sessions at Austin, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Gulf, Colorado & Santa Fe Railway Company and W. H. Ellis, by next friend, H. W. Ellis, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Gulf, Colorado & Santa Fe Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,
you send the record and proceedings aforesaid, with all
44 things concerning the same, to the Supreme Court of the
United States, together with this writ, so that you have the

same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 1st day of June, in the year of our Lord one thousand eight hundred and ninety-four.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States in and for the Western District of Texas for the Fifth Circuit.

June 1st, 1894.

Allowed by—
JOHN W. STAYTON,
Chief Justice of the said Supreme Court of the State of Texas, at Austin, Texas.

44½ [Endorsed:] Original. The Gulf, Colorado and Santa Fe Railway Company *vs.* W. H. Ellis, by next friend, H. W. Ellis. Writ of error.

45 United States of America to W. H. Ellis and to H. W. Ellis, next friend of W. H. Ellis, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, at Austin, Texas, wherein The Gulf, Colorado & Santa Fe Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. W. Stayton, chief justice of the supreme court of the State of Texas, at Austin, Texas, this 1st day of June, 1894.

JOHN W. STAYTON,
Chief Justice.

Attest: CHAS. S. MORSE,
Clerk Supreme Court of Texas.

[Seal Supreme Court of the State of Texas.]

[Endorsed:] Original. The Gulf, Colorado and Santa Fe Railway Company *vs.* W. H. Ellis, by next friend, H. W. Ellis. Citation in error.

45½ We hereby acknowledge receipt of a copy of the within citation in error, and hereby accept service of the same and waive further notice.

W. H. ELLIS AND
H. W. ELLIS,
Next Friend of W. H. Ellis,
By A. McFARLAND,
Their Att'y of Record.

46 *Writ of Error Bond.*

Know all men by these presents that we, The Gulf, Colorado & Santa Fe Railway Company, as principal, and J. H. Hutchings and H. O. Stein, as sureties, are held and firmly bound unto W. H. Ellis and unto H. W. Ellis, as next friend of W. H. Ellis, jointly and severally, in the full and just sum of one thousand ($1,000) dollars, to be paid to the said W. H. Ellis and to the said H. W. Ellis, next friend of W. H. Ellis, jointly and severally, his or their certain attorney, executors, administrators, or assigns; to which payment, well and truely to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the supreme court of the State of Texas, in a suit depending in said court between The Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, and W. H. Ellis, by next friend, defendant in error, a judgment was rendered against the said Gulf, Colorado & Santa Fe Railway Company and in favor of the said W. H. Ellis, by which judgment the judgment of the district court of Lampasas county, Texas, and of the court of civil appeals of Texas in said cause was affirmed, and the said Gulf, Colorado & Santa Fe Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. H. Ellis and to the said H. W. Ellis, next friend of W. H. Ellis, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the Gulf, Colorado & Santa Fe Railway Company shall prosecute said writ of error to effect and answer all damages and costs if
47 it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Per J. W. TERRY, *Sol. for Tex.* [SEAL.]
J. H. HUTCHINGS. [SEAL.]
H. O. STEIN. [SEAL.]

Attest: JOHN M. BIRD, *Secretary.* [SEAL.]

June 1st, 1894.—Approved by—
JOHN W. STAYTON,
Chief Justice Supreme Court of Texas.

I, J. H. Hutchings, do swear that I am worth, in my own right, at least the sum of one thousand dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth more than one thousand dollars.

J. H. HUTCHINGS, *Surety.*

Sworn to & subscribed before me this the 31st day of March, A. D. 1894.

[SEAL.] As witness my hand and official seal.

C. M. KEMP,
Notary Public, Galveston County, Texas.

I, H. O. Stein, do swear that I am worth, in my own right, at least the sum of one thousand dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known
48 to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth one thousand dollars or more.

H. O. STEIN, *Surety.*

Sworn to and subscribed before me this the 31st day of May, A. D. 1894.

As witness my hand and official seal.

C. M. KEMP,
[SEAL.] *Notary Public, Galveston County, Texas.*

Indorsed: The Gulf, Colorado & Santa Fe Railway Company *vs.* W. H. Ellis, by next friend, H. W. Ellis. Writ of error bond. Filed in supreme court of Texas June 4, 1894. Chas. S. Morse, clerk.

Certificate of Clerk of Supreme Court.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above and foregoing forty-seven (47) pages contain a true and correct copy of all the proceedings had in cause No. 44, entitled The Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, *vs.* W. H. Ellis, by next friend, H. W. Ellis, defendant in error, as the same appears from the records and papers pertaining to said cause now on file in my office.

Witness my hand and the seal of said court this the 22d day of June, A. D. 1894.

[Seal Supreme Court of the State of Texas.]

CHAS. S. MORSE, *Clerk, &c.*

Statement of the Case.

This is a suit instituted by the appellee, W. H. Ellis, by next friend, H. W. Ellis, against the appellant, in the justice court of precinct No. 1, Lampasas county, Texas wherein by an amended account filed October 9, 1890, the plaintiff charges in substance that on or about the 12th day of August, 1890, the appellant, by its engines and cars, killed a certain colt, the property of the appellee, of the value of $50. He further charges that he presented his claim, verified by affidavit, to the defendant's station master nearest the place where the colt was killed, according to the provisions of the act of 1889, and that amount was not paid at the expiration of thirty days after the presentation of the claim; wherefore plaintiff claims $10 additional as attorney's fees, as provided by said act of the legislature (Tr., 1, 2). The appellant filed an answer by which it in substance admitted the allegations in plaintiff's account, but denied that it was liable for attorney's fees, and moved the court to strike out plaintiff's claim for the same (Tr., 3). There was a judgment in the justice court for the sum of fifty dollars, with interest and attorney's fees (Tr., 4, 5), from which appellant prosecuted an appeal to the district court of Lampasas county. At the November term of the district court the same judgment was rendered in favor of the appellee, from which judgment the appellant prosecuted the appeal to this court. (Tr., 4, 5, 6.)

The defendant, in open court, excepted to so much of the judgment as allowed $10 attorney's fees, and in open court gave notice of appeal to the supreme court of the State of Texas. (Tr., 5.)

There is an agreement of the counsel in the record making the appeal returnable to the Galveston term of this court. (Tr., 8.)

50 First assignment of error. The court erred in finding judgment in favor of plaintiff for $10 attorney's fees, because the act of the legislature authorizing the recovery of attorney fees in certain cases, being an act entitled "An act to regulate the presentation and collection of personal services or labor or for damage or overcharge on freight against railway corporations doing business in this State in cases where the amount claimed does not exceed $50, and to fix the measure of damages recoverable in certain of such cases," and known as house bill No. 307, and being section 1 of chapter 107, approved April 5, 1889, page 131 of the acts of 1889, is unconstitutional because the same is in violation of section 19 of the bill of rights, and because the same is in violation of section 56 of article 3 of the constitution of the State of Texas.

First proposition under above assignment. The act of the legislature which allows the attorney's fee in question is in violation of section 2 of the bill of rights of the constitution of Texas, which says: "That the faith of the people of Texas stands pledged to the preservation of a republican form of government," and is in violation of section 3 of the said bill of rights, which says: "That all

free men when they form a social compact have equal rights," and is in violation of section 19 of said bill of rights, which provides that "no citizen of this State shall be deprived of life, liberty or property, privileges or immunities, or in any manner disfranchised, except by due course of the law of the land."

STATEMENT.—The matters in controversy have been substantially stated in the statement of the case. The act of the legislature is as follows:

"An act to regulate the presentation and collection of personal services or labor or for damages or for overcharge on freight against railway corporations doing business in this State in cases where the amount claimed does not exceed $50, and to fix the measure of damages recoverable in certain of such cases.

51 SECTION 1. Be it enacted by the legislature of the State of Texas: That after the time when this act shall take effect any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight or claims for stock killed or injured by the train of any railway company provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."

Authorities: Van Zandt *vs.* Waddell, 2 Yerger, 260; Bank *vs.* Cooper, *id.*, 605; Walley's Heirs *vs.* Kenedy, *id.*, 554; R. R. Co. *vs.* Morris, 65 Ala., 199; R. R. Co. *vs.* Morse, 60 Miss., 646; Wilder *vs.* C., etc., R'y (Mich.), 35 A. & E. R. R. Cases, 162; St. L., etc., R'y *vs.* Williams (Ark.), 31 A. & E. R. R. Cases, 555; Gordon *vs.* Winchester Ass'n, 12 Bush, 110; Green *vs.* Briggs, 1 Curtis, 327; Hoke *vs.* Henderson, 4 D. E. V. L. (N. C., 15); Durkee *vs.* City of Janesville, 28 Wis., 464.

Second proposition under above assignment. The act of the legislature allowing attorney's fees is in violation of so much of
52 section 1, article 14, of the Constitution of the United States as reads, "Nor shall any State deprive any person of life,

liberty, or property without due process of law, nor deny to any person in its jurisdiction equal protection of the law."

Authorities: Same as under first proposition.

Third proposition under above assignment. The act of the legislature in question is so discriminatory in its character, being directed against one class of citizens alone, that even if it be not prohibited by any specific provision in the constitution of the State, it is so opposed to the principles of republican government that it cannot be presumed that the people intended to have conferred power on the legislature to pass it, and therefore it cannot be held that the legislature had such power.

Authorities: Durkee *vs.* Janesville, 28 Wis., 464, and authorities cited; Taylor *vs.* Porter, 4 Hill, 140.

Fourth proposition under above assignment. The act in question is in violation of section 56, article 3, of the constitution of Texas, which prohibits the legislature from passing any special law providing for or changing the methods for the collection of debts or the enforcing of judgments. It is also in violation of the general clause of such section, which prohibits the legislature from passing a special law in all cases where a general law could be made applicable.

Authorities: ——.

Respectfully submitted.

J. W. TERRY,
Counsel for Appellant.

Indorsed: G., C. & S. F. R'y Co., appellant, *vs.* W. H. Ellis, by next friend, H. W. Ellis, appellee. Brief for appellant. Filed (at Galveston) February 13, 1891. D. D. Atchison, clerk. Filed in court of civil appeals, 3rd supreme judicial district of Texas, October 3rd, 1892. Will L. Vining, clerk. Filed in supreme court, at Austin, July 20, 1893. Chas. S. Morse, clerk.

53 In the Supreme Court of the United States.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
W. H. ELLIS, by Next Friend, H. W. ELLIS, Defendant in Error.

Now comes The Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, by its attorney, J. W. Terry, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decision of the supreme court of Texas, to wit, the supreme court of Texas erred in holding that the enforcement of the act of the legislature of Texas approved April 5th, 1889, by allowing a recovery by the defendant in error fromm plaintiff in error of the attorney's fee provided for by said act would not deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the law in violation of and contrary to section 1,

article 14, of the Constitution of the United States; which said act of the legislature of Texas is as follows:

An act to regulate the presentation and collection of personal services or labor or for damages or for overcharge on freight against railway corporations doing business in this State in cases where the amount claimed does not exceed $50, and to fix the measure of damages recoverable in certain such cases.

SECTION 1. Be it enacted by the legislature of the State of Texas: That after the time that this act shall take effect any person in this State having a valid *bona fide* claim for personal services
54 rendered or labor done, or for damages, or for overcharges on freight or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."

And for the reason herein assigned the supreme court of Texas erred in affirming the judgment of the court of civil appeals of Texas and of the district court of Lampasas county, Texas, by which said judgments the defendant in error recovered of plaintiff in error an attorney's fee of $10, it being admitted that defendant in error had complied with the requirements or conditions of said act of the legislature, and hence that if the said act of the legislature was constitutional that he was entitled to recover said attorney's fee.

And the said Gulf, Colorado and Santa Fe Railway Company prays that the judgment aforesaid of the supreme court of Texas may be reversed and the case remanded to the supreme court of Texas with directions to enter a judgment for the defendant in error for his actual damages as shown by the record, exclusive of said attorney's fee.

J. W. TERRY,
Attorney for Plaintiff in Error.

55 [Endorsed:] In the Supreme Court of the United States. Gulf, Colorado & Santa Fe R'y Co., plaintiff in error, *vs.* W. H. Ellis, by next friend, H. W. Ellis, defendant in error. Assignments of error. Filed in supreme court of Texas June 22d, 1894. Chas. S. Morse, clerk.

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In Error to the Supreme Court of the State of Texas.

Brief and Argument for Plaintiff in Error.

E. D. KENNA,
J. W. TERRY,
Att'ys for Plaintiff in Error.

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STATEMENT.

On April 5, 1889, the legislature of the State of Texas passed this act:

"An act to regulate the presentation and collection of "personal services or labor or for damages or for over- "charge on freight against railway corporations doing "business in this State in case where the amount claimed "does not exceed $50, and to fix the measure of damages "recoverable in certain such cases.

"Section 1. Be it enacted by the legislature of the "State of Texas: That after the time that this act shall "take effect, any person in this State having a valid bona "fide claim for personal services rendered or labor done, "or for damages, or for overcharges on freight or claims "for stock killed or injured by the train of any railway "company, provided that such claim for stock killed or "injured shall be presented to the agent of the company "nearest to the point where such stock was killed or in-"jured, against any railway corporation operating a rail-"road in this State, and the amount of such claim does "not exceed $50, may present the same, verified by his "affidavit, for payment to such corporation by filing it "with any station agent of such corporation in any county "where suit may be instituted for the same, and if, at the "expiration of thirty days after such presentation, such "claim has not been paid or satisfied, he may immediately "institute suit thereon in the proper court and if he shall "finally establish his claim and obtain judgment for the "full amount thereof, as presented for payment to such "corporation in such court, or any court to which suit "may have been appealed, he shall be entitled to recover "the amount of such claim and all costs of suit, and in "addition thereto all reasonable attorney's fees, provided "he has an attorney employed in his case, not to exceed "$10, to be assessed and awarded by the court or jury try-"ing the issue." (General Laws of Texas, 1889, p. 131.)

W. H. Ellis, by his next friend, H. W. Ellis, by his amended account filed in cause No. 1956, in justice court of precinct No. 1, Lampasas county, Texas, September term, 1890, sued the Gulf, Colorado and Santa Fe Railway company for $50, the value of one colt, which was struck and killed by the engine and cars of the railway company on or about August 12, 1890. He alleged that he had presented his claim verified, as required by the above act of the legislature, to the nearest station agent of the railroad company and the claim had not been paid at the expiration of thirty days. Wherefore he prayed for $10 attorney's

fee, in addition to $50, the value of the animal, as provided by said act. (Printed Record, p. 1.)

October 11, 1890, the railway company filed its answer in the justice court, in which it admitted the killing of the animal, its value $50, and that plaintiff had presented his verified account as alleged, but denied the right of the plaintiff to an attorney's fee of $10 or any sum, and prayed the court to strike out plaintiff's claim for attorney's fee. (Printed Record, p. 2.)

Judgment was rendered in the justice court for plaintiff on October 11, 1890, for $60. (Printed Record, p. 2.)

Plaintiff in error duly prosecuted an appeal from that judgment to the district court of Lampasas county. (Printed Record, p. 3.) Nov. 15, 1890, the District Court of Lampasas county rendered judgment for plaintiff, Ellis, against defendant railway company for the sum of $50, with legal interest, and that plaintiff, Ellis, "do have and "recover of and from the defendant, the Gulf, Colorado "and Santa Fe Railway company, a corporation duly incor- "porated under the laws of the State of Texas, the further "sum of $10 as attorney's fees, for all of which let execu- "tion issue." Defendant railway company in open court excepted to so much of the judgment as allowed $10 attorney's fee and gave notice of appeal to the Supreme Court of Texas. (Printed Record, pp. 4-5.) Which said appeal was duly perfected. (Printed Record, pp. 5-6.)

December 18, 1891, the Supreme Court of Texas made an order transferring the case to the Commission of Appeals for their examination. February 1, 1892, the Commission of Appeals made their report to the Supreme Court, accompanied by a written opinion recommending the affirmance of the judgment, which opinion and report

was adopted by the Supreme Court and the judgment affirmed. (Printed Record, pp. 8-13.) The opinion of the Commission of Appeals, so adopted by the Supreme Court, will be found on pages 8 to 12 of the Printed Record. Plaintiff in error filed its motion for rehearing, which, on March 25, 1892, was granted. (Printed Record, pp. 13-15.) After the granting of such motion, a change in the judicial system of Texas took effect, whereby intermediate Courts of Civil Appeals were created, and the Supreme Court required to transfer all causes then pending on its docket to such courts, and this cause was by an order made October 3, 1892, transferred to the Court of Civil Appeals for the Third Supreme Judicial District, which court on March 8, 1893, entered its judgment affirming the judgment of the district court of Lampasas county. The opinion of the Court of Civil Appeals will be found at pages 16 to 20 of the Printed Record.

Plaintiff in error filed a motion for rehearing in the Court of Civil Appeals and the motion was overruled May 3, 1893. (Printed Record, pp. 21-22.) May 22, 1893, plaintiff in error filed in the Supreme Court of Texas its petition for writ of error, which writ of error was granted and the cause thereby removed to the Supreme Court of Texas, which court, on May 8, 1894, entered a judgment affirming the judgment of the Court of Civil Appeals and of the District Court of Lampasas county. The opinion of the Supreme Court appears on pages 26 to 28 of the Printed Record.

By due proceedings the cause was removed to this court. (Printed Record, pp. 29-33.)

The Federal question was raised by plaintiff in error in its original brief on which the cause was first submitted in the Supreme Court of Texas, (Printed Record, p. 35,) and has since been insisted on.

ASSIGNMENT OF ERROR.

"Now comes the Gulf, Colorado and Santa Fe Railway "company, plaintiff in error, by its attorney, J. W. Terry, "and says that in the record and proceedings aforesaid "there is manifest error in the judgment and decision of "the Supreme Court of Texas, to-wit., the Supreme Court "of Texas erred in holding that the enforcement of the "act of the legislature of Texas, approved April 5, 1889, "by allowing a recovery by the defendant in error from "plaintiff in error of attorney's fee provided for by said "act would not deprive plaintiff in error of its property "without due process of law, and deny to it the equal pro- "tection of the law, in violation of and contrary to Section "1, Article 14, of the Constitution of the United States; "which said act of the legislature of Texas is as follows:

(The act of the legislature, above, is here quoted.)

"And for the reason herein assigned the Supreme Court "of Texas erred in affirming the judgment of the Court of "Civil Appeals of Texas and the District Court of Lam- "pasas county, Texas, by which said judgments the de- "fendant in error recovered of plaintiff in error an attor- "ney's fee of $10, it being admitted that defendant in "error had complied with the requirements or conditions "of said act of the legislature, and hence that if the said "act of the legislature was constitutional that he was en- "titled to recover said attorney's fee.

"And the said Gulf, Colorado and Santa Fe Railway "company prays that the judgment aforesaid of the Su- "preme Court of Texas may be reversed and the case re- "manded to the Supreme Court of Texas with direc- "tions to enter a judgment for the defendant in error for "his actual damages as shown by the record, exclusive of "said attorney's fee."

ARGUMENT.

Counsel for defendant in error not feeling that he and his client have sufficient interest in this case to justify the expense of a trip to Washington, or of the printing of a brief and argument, relies on the three opinions of the Texas Courts, and counsel for plaintiff in error, not desiring to engage in a one-sided oral argument, have concluded to submit the cause on this, its printed brief and argument, in which we will consider those opinions as the argument of our opponent, and will endeavor to answer the same in the order in which they were written, in the doing of which we will indicate the particular grounds on which it is maintained that the act in question is void, under the doctrine that the enforcement of a statute, which could be made to apply generally to all persons in the State, but is confined to a particular class of persons and deprives them of property rights or imposes upon them or their property burdens, fines, penalties, forfeitures, attorney's fees, or whatever name may be adopted, not imposed upon the person or property of all others under substantially similar conditions, deprives such class of persons of property without due process of law and of the equal protection of the law.

THE OPINION OF THE COMMISSION OF APPEALS.

This opinion in sustaining the validity of the act finds that it was in the power of the legislature to fix the measure of damages in certain cases. While such power undoubtedly exists, it must be exercised subject to the same constitutional restrictions under which the legislature would have to act in undertaking to fix the value of milk or in legislating upon any subject. It can not be assumed because the act merely purports to fix the measure of dam-

ages that it is therefore constitutional. (Passenger Railway vs. Bandron, 92 Pa. St., p. 475; Park vs. Free Press, 72 Mich., p. 560.)

If the legislature had provided that in all suits the successful litigant should recover an attorney's fee of $10, it would have been an unexceptional exercise of its power to fix the measure of damages, but whether under the guise of determining the measure of damages it can prescribe discriminatory regulations against one class of citizens founded on no reason peculiar to that class presents a different question.

The court refers to the law allowing the Supreme Court to assess 10 per cent. damages for appeals taken for delay, a proper provision, but if, instead thereof, the legislature had enacted that in any case where an appeal was taken for delay by a mechanic, 10 per cent. damages should be assessed, leaving all others free to prosecute such appeals without incurring damages, we do not think that such law would be held constitutional by any court in the United States.

The court alludes to the law allowing assessment of damages on a claimant who fails to establish his right to property in certain proceedings. The same answer is made to this, that such statute is constitutional as long as it applies to all litigants, but if it should be restricted to farmers who should make claim to property in such proceedings, and fail to sustain the same, leaving all others free to make such claim and litigate the same without being liable for such damages, no court would sustain such act as constitutional.

We think it can therefore be concluded that the argument that the statute is constitutional because it is a supposed regulation of the measure of damages is merely begging the entire question.

The opinion says: "We are not able to see that the "principles invoked in appellant's brief are violated by "the act under consideration, nor do we think the cases "discussed so fully by him are decisive of the questions "before us."

In view of this statement, it seems singular that the opinion while pointing out the want of analogy in the facts of certain cases cited by the appellant, not as being similar in their facts, but for the principles enunciated, should entirely omit reference to the decisions referred to in the appellant's brief, from the highest tribunals of four States, which have held that statutes allowing attorney's fees in cases of railroads only are unconstitutional, and which, we think, "are decisive of the questions before us." While for the sake of the principles enunciated, and in view of the importance of the question involved, not only in respect to the operation of the statute under consideration, but on account of the precedent which the opinion establishes for further arbitrary legislation, we shall quote copiously from other cases, at the same time we respectfully invite the special consideration of the court to the cases from the four States referred to. (Railroad Company vs. Morris, 65 Ala., p. 193; Railroad Company vs. Morse, 60 Miss., p. 641; Railroad Company vs. Williams, (Ark.) 31, A. and E. R. R. Cases, p. 555; Wilder vs. Railroad Company, (Mich.), 35, A. and E. R. R. Cases, p. 162; also Railroad Company vs. Beatty, 6 Neb., p. 37; Joliffe vs. Brown (Wash.) 3, (N. S.) A. and E. R. R. Cases, p. 254.)

The cases in which the question "what is due process of "law," has arisen may be divided into two general classes:

1. Where the right to take or deprive a citizen of property is conceded and the question is whether proper procedure has been provided for the exercise of such right; in other words, where the remedy alone is in question.

2. Where the right to take or deprive a citizen of property at all, no matter how perfect the machinery for taking the property may be, is disputed.

In view of the fact that no strictly accurate general definition of due process of law has ever been given, and of the opinion that it is best that none be attempted, but that it should be left "to the gradual process of judicial "inclusion and exclusion," (Davidson vs. New Orleans, 96 U. S., p. 97) it will be readily seen that a partial definition given by a court having a case of one class under consideration is not necessarily authority in a case belonging to the other class.

The opinion decides that because the act in question "hears before it concludes, proceeds upon inquiry and "renders judgment only after trial," it is valid.

The act was not attacked by the appellant on the ground that it did not provide a perfect judicial machinery for seizing the $10, but on the ground that plaintiff could not, under the terms of the act, constitutionally seize the $10, however perfect the judicial process, and that the case belonged to the second class, the existence of which we will now undertake to show,—under the general rule, that no matter how faultless the judicial machine, provided for inflicting the same may be, yet an act of the legislature which attempts to impose burdens or liabilities upon one class of citizens which are not placed on all others, under the same circumstances, is not "the law of the land."

The definition of Mr. Webster in the Dartmouth College case, partially quoted by the Commission of Appeals, recognizes the second class, for he was there contending not that the legislature had not provided proper process for doing the thing, but that the legislature had no power to do the thing at all. Mr. Webster said:

"By the law of the land is most clearly intended *the* "*general law*; a law which hears before it condemns; which "proceeds upon inquiry, and renders judgment only after "trial. The meaning is, *that every citizen shall hold his* "*life, liberty, property and immunities under the protection* "*of the general rules which govern society.* Everything "which may pass under the form of an enactment is not "therefore to be considered the law of the land." (5 Webster's Works (19 Ed.) p. 487.)

Those cases (collated in Meyer on Vested Rights, p. 38), which hold, though there be no express provision of the constitution forbidding it, that a statute which authorizes the taking of private property for private use upon the making of full compensation to the owner, to be ascertained under unobjectionably perfect judicial machinery, is void because repugnant to the principles of the constitution, are in themselves conclusive evidence of the existence of the second class.

In 1829, in Van Zandt vs. Waddell, 2 Yerger, p. 260, the Supreme Court of Tennessee said:

"That a partial law, tending directly or indirectly to "deprive a corporation or an individual of rights of prop-"erty, or to the equal benefits of the general and public "laws of the land, is unconstitutional and void, we do not "doubt. Our entire approbation is accorded to the de-"cisions cited in the cases of Dartmouth College vs. Wood-"ward, 4 Wheat. Rep., p. 518, and Holden vs. James, 11 "Mass., p. 396. Our Constitution, Article 11, Section 8, "declares: 'That no free man shall be deprived of his "life, liberty or property, but by the judgment of his peers "*or the law of the land.*' The clause 'law of the land' "means a general and public law, equally binding upon "every member of the community. Our colonial history "will best teach its meaning. Our ancestors were taught "its meaning by being transported across the Atlantic "for trial, by the Boston port bill and other British legis-"lation. A careful examination of Marshall's History of

"the Colonies, particularly the 13th and 14th chapters, "and of Smollett's and Bissett's History of England, "especially volume 1, chapter 12, of the latter, will greatly "tend, it is apprehended, to change the opinion of the "counsel of the plaintiff, who contended in argument that "this term had no definite meaning, at least not the one "here ascribed to it, and that it answered no useful pur- "pose in the Constitution. Notwithstanding the pro- "vision, is it to be supposed that the legislature, equally "with the governments of France, Russia or Turkey, is "sovereign in this respect, even retaining the powers of "individual prescription extending to banishment as well "as power to legislate partially in reference to particular "individuals, affecting their rights by partial and extra- "ordinary remedies?

"The right to life, liberty and property of every indi- "vidual must stand or fall by the *same rule or law that* "*governs every other member, of the body politic or 'land,'* "*under similar circumstances*; and every partial or private "law which directly proposes to destroy or affect indi- "vidual rights, *or does the same thing by affording remedies* "*leading to similar consequences, is unconstitutional and* "*void. Were this otherwise, odious individuals and corpor-* "*ate bodies would be governed by one rule, and the mass of* "*the community who made the law, by another.* The idea of "a people, through their representatives, making laws "whereby are swept away the life, liberty and property of "one or a few citizens, by which the representatives and "their constituents are not willing to be bound, is too "odious to be tolerated in any government where freedom "has a name. Such abuses resulted in the adoption of "Magna Charta in England, securing the subject against "odious exceptions, which is, and for centuries has been, "the foundation of English liberty. Its infraction was a "leading cause why we separated from that country, and "its value as a fundamental rule for the protection of the "citizens against legislative usurpation was the reason "of its adoption as part of our Constitution. See 2 Inst., "46, and the Declaration of American Independence."

In 1831, in the case of Bank vs. Cooper, 2 Yerger, p. 605, Justice Green, of that court, said:

"By the law of the land is meant a general and public "law, *operating equally on every individual in the com-* "*munity.* Such is the opinion of Judge Catron in the case "before referred to, and such was the opinion of Lord "Coke upon the construction of Magna Charta. In his "commentary on this instrument (2 Institute, p. 51) he "says that the term, 'law of the land,' was used that the "law might extend to all. He informs us that parliament, "by an act in the eleventh year of Henry VII, violated the "principles of the great charter in this particular, and "that under the authority of this act Empson and Dudley "committed horrible oppressions and exactions, to the un- "doing of many people. But that in the first year of "Henry VIII this act was repealed on the avowed ground "that it was a violation of the charter. 'And the ill suc- "cess hereof,' he adds, 'and the fearful end of these two "oppressors, should deter others from committing ordi- "nary and precious trial *per legen terrae*, they bring not in "absolute and partial trials by discretion.'

"If the construction here contended for be not the true "one, it seems to me that an edict in the form of a legisla- "tive enactment, taking the property of A and giving it "to B, might be regarded as 'the law of the land' and not "forbidden by the Constitution. But such a proposition "is too absurd to find a single advocate. This provision "was introduced to secure the citizens against the abuse "of power by the government. Of what benefit is it if it "imposes no restraint upon legislation? Was there not "as just ground to apprehend danger from the legislature "as from any quarter? Legislation is always exercised "by the majority. Majorities have nothing to fear, for "the power is in their hands. They need no written con- "stitution defining and circumscribing the powers of the "government. *Constitutions are only intended to secure the* "*rights of the minority.* They are in danger. The power "is against them, and the selfish passions often lead us to "forget the right. *Does it not seem conclusive, then, that* "*this provision was intended to restrain the legislature from* "*enacting any law affecting injuriously the rights of any* "*citizen, unless at the same time the rights of all others in* "*similar circumstances were equally affected by it?* If the "law be general in its operation, affecting all alike, *the*

"*minority are safe*, because *the majority* who make the law "*are operated on by it* equally with the others. Here is the "importance of the provision and *the great security it* "*affords.*"

Again, in 1831, in Walley's Heirs vs. Kennedy, 2 Yerger, p. 554, that court said:

"What is the 'law of the land?' This court on two oc- "casions and upon the most mature consideration has de- "clared the clause, 'the law of the land,' means a general "public law, equally binding upon every member of the "community. The rights of every individual must stand "or fall by the same rule or law that governs every other "member of the body politic, or land, under similar cir- "cumstances; and every partial or private law which di- "rectly proposes to destroy or affect individual rights, or "does the same thing by affording remedies leading to "similar consequences, is unconstitutional and void. "Were it otherwise, odious individuals or corporate b dies "would be governed by one law, the mass of the com- "munity and those who made the law by another; whereas "a like general law affecting the whole community equally "could not have been passed."

In the case of Janes vs. Reynolds, 2 Texas, p. 250, the meaning given by the Tennessee court to the words in question are adopted. It is there stated: "They are now "in their most usual acceptation *regarded as general public* "*laws, binding all the members of the community under sim-* "*ilar circumstances*, and not partial or private laws, affect- "ing the rights of private individuals *or classes of individ-* "*uals.*"

The meaning given these words by the Tennessee court appears to have been generally adopted.

We quote from Millett vs. The People, 117 Ill., p. 294:

"The words, 'due process of law,' in this connection are "held to be synonymous with the words, 'the law of the

"land' (Cooley Con. Lim., 1st. Ed., pp. 352-353,) and this "means general public law, *binding upon all the members* "*of the community, under all circumstances, and not partial* "*or private laws affecting the rights* of private individuals "*or classes of individuals.*"

(Janes vs. Reynold, 2 Texas, p. 251; Wynenamer vs. People, 13 N. Y., p. 432; Vanzant vs. Waddell, 2 Yerg., p. 269.)

"'Every one,' says Cooley (5 Ed., p. 584), 'has a right to "demand that he be governed by general rules, and a "special statute which singles his case out as one to be "regulated by a different law from that which is applied "in all similar cases would not be legitimate legislation, "but an arbitrary mandate not recognized in free govern-"ment.' Mr. Lock has said of those who make the laws: "'They are to govern by promulgated, established laws, "not to be varied in particular cases, but to have one rule "for rich and poor; for the favorite at court, and the coun-"tryman at plow; and this may justly be said to have be-"come a maxim in the law by which may be tested the "authority and binding force of legislative enactments. "The doubt might also arise, whether a regulation made "for any one class of citizens, entirely arbitrary in its "character, and restricting their rights, privileges, or "legal capacities in manner before unknown to the law, "could be sustained. Distinctions in these respects should "be based upon some reason which renders them impor-"tant, like the want of capacity in infants and insane per-"sons; but if the legislature should undertake to provide "that persons following some specified lawful trade or "employment should not have capacity to make contracts, "or to receive conveyances, or to build such houses as "others were allowed to erect, or in any other way to make "such use of their property as was permissible to others, "it can scarce be doubted that the act would transcend "the due bounds of legislative power, even if it did not "come in conflict with express constitutional pro-"visions.'"

It is there held that a statute making special provisions regulating the contract of miners, is void, being in conflict with the due process clause.

"By 'the law of the land' we understand laws *that are* "*general in their operation, and that affect the rights of all* "*alike*, and not a special act of the legislature passed to "affect the rights of an individual against his will, and "in a way in which the same rights of other persons are "not affected by existing laws. Such an act, unless ex- "pressly authorized by the Constitution or clearly coming "within the general scope of legislative power, would be "in conflict with this part of the constitution, and for "that reason, if no other, void." (Sears vs. Cottrell, 1 Mich., p. 253.)

"The meaning of that provision has generally been con- "strued to be the law that hears before condemning, and "writes out a judgment for the divestiture of rights or "property, through what is ordinarily understood to be a "judicial process. *The general rules that govern society in* "*reference to the rights of property.*" (Varden vs. Mount, 78 Ky., p. 89.)

"Those terms, 'law of the land,' do not mean merely an "act of the general assembly. If they did, every restric- "tion upon the legislative authority would be at once abro- "gated. For what more can the citizen suffer than to be "'taken, imprisoned, disseized of his freehold, liberties "and privileges; be outlawed, exiled and destroyed and be "deprived of his property, his liberty and his life' "without crime? Yet all this he may suffer if an act of "assembly simply denouncing those penalties on particu- "lar persons *or an ordinary class of persons*, be in law itself "the law of the land within the sense of the constitution. "*For what is in that sense the law of the land, must be duly* "*observed by all and upheld and enforced by the courts.*" (Hoke vs. Henderson, 4 Devereux, N. C., p. 15.)

"It is manifestly contrary to the first principles of civil "liberty and natural justice, and to the spirit of our con-

"stitution and laws, that any one citizen should enjoy privi-
"leges and advantages which are denied to all others un-
"der like circumstances, or that any one should be subject
"to losses, damages, suits or actions, *from which all others*
"*under like circumstances are exempted*." (Holden vs. James, 11 Mass., p. 405.)

"There is nothing plainer in the bills of rights than
"the principle that all men must stand on an equality be-
"fore the judicial tribunals, and they do not stand so if
"the judiciary is bound to admit an inequality created
"by a legislative decree, by which a statute of limitation
"or any other element of the remedy is set aside or al-
"tered for any particular case or person so as to affect the
"right. However inexpedient any given change may be,
"none can complain of inequality in it if it be made to
"apply to all alike. Any people bear with patience even
"very defective laws *when they operate alike on all*, because
"equality of administration is a large and essential ele-
"ment of justice." (Boggs' Appeal, 43 Pa. St., p. 512.)

"It is said in answer, that these provisions of the char-
"ter are inoperative and void, because in violation of the
"principle of constitutional law which prohibits unequal
"and partial legislation upon general subjects, the en-
"actment of a special law dispensing with the general
"law in a particular case, or granting to one man or cor-
"poration, by way of exemption from the operation of
"a general law, a privilege or indulgence which no other
"person or corporation has or enjoys. There is no reason
"to doubt the existence or correctness of the constitu-
"tional principle which forbids such legislation. Enact-
"ments of the kind have frequently been held unconsti-
"tutional and void. * * * Words can not make the
"inequality and injustice of the rule plainer than it thus
"appears; and the question is, whether the legislature
"can so discriminate between suitors or parties to the
"same litigation in a court of justice as that one of them
"should have such special and important pecuniary ad-
"vantage over the other? I, for one, think not; and in
"declaring my opinion I care very little whether it is
"placed on those fundamental principles of law and jus-

"tice which, in our form of government, it has been held "no legislative body can override, even though not pro- "hibited by the written Constitution itself, some of which "clearly forbid enactment of such laws. * * * It is "undoubtedly a safe and sound general proposition that "for the court to declare an act of the legislature void "for unconstitutionality some specific clause or provision "of the Constitution must be pointed out which has been "violated. But the rule is not without its exceptions, "as the above references show, and as might be shown "by reference to numerous other decisions. If we take, "for example, the numerous cases where acts of the legis- "lature authorizing the taking of private property for "private use have been held void, even though full com- "pensation has been made or provided for the property "taken, we shall find that in none of these "was there any express or positive prohibi- "tion of such legislation in the Constitu- "tion and fundamental written law of the State. And "the same remark is true of those cases where taxation "for private purposes has been held invalid, though au- "thorized, or attempted to be, by the legislature. And "to these, it is presumed, other citations might be added, "showing a want of power in the legislature in other re- "spects, when the Constitution imposes no direct or posi- "tive restraint. It seems to be true, therefore, of written "constitutions as of statutes, that 'when made, there are "some things which are exempted and foreprized out of "the provisions thereof by the law of reason, though not "expressly mentioned.' (Potter's Dwarris, p. 123.) The "grant of legislative powers, though, without prohibition "or restraint that the legislature shall not discriminate "and do gross and palpable injustice between man and "man by the passage of unequal and partial laws, does "not carry with it the power to pass such laws. Such a "power, from its very nature and of necessity, is 'fore- "prized' and taken out of the grant, without any express "exception or limitation, and the act, though in form "of law, yet, not being within the scope of the authority "conferred, is not legislation at all, and so is void." (Dur- kee vs. Jainsville, 28 Wis., p. 464.)

People *ex rel.* vs. Common Council, (Mich. 1888, 38 N. W. Rep., p. 470) held that a law prohibiting one liquor dealer from signing another's bond was void, because in restriction of liberty and unequal class legislation. The doctrine is well stated by the court (p. 471) as follows:

"The provisions, however, of this act, prohibiting a per-
"son because of the business in which he is engaged, from
"entering into contracts of a certain class, *the same being*
"*open to all other persons*, would be a violation of the con-
"stitutional principle that no person shall be deprived of
"life, liberty or property without due process of law. The
"right to sign a bond or enter into any other contract can
"not be made to depend upon the business in which one
"is engaged. The right to sell liquor in this State is
"made lawful under certain conditions and restrictions,
"by the act itself. Liberty is something more than mere
"freedom from physical restraint. It means freedom to
"go where one may choose, and to act in such manner,
"not inconsistent with the equal rights of others, as his
"judgment may dictate for the promotion of his happi-
"ness; that is, to pursue such callings and avocations as
"may be most suitable to develop his capacities and to
"give them their highest enjoyment."

Grand Rapids Chair Co. vs. Runnels (43 N. W. Rep., p. 1006): In this case held that an act of the legislature requiring an attorney's fee to be taxed on behalf of plaintiff in all suits for personal service is void, as unequal and class legislation.

City of Jacksonville vs. Carpenter (77 Wis., S. C., 20 Am. St. Rep., p. 125): In this case held that an act of the legislature prohibiting certain riparian owners to certain places on Rock river from forcing piles into the river and building on the same, etc., and authorizing injunctions to restrain such building, was unconstitutional and void, as class legislation. Note the language of the court (p. 134), as follows:

"This statute is discriminating and class legislation, in "violation of the spirit of our Constitution, and contrary "to the principles of civil liberty and natural justice. It "gives to a certain class of citizens privileges and advan- "tages which are denied to all others in the State under "like circumstances, and *subjects one class to losses, dam- "ages, suits or actions from which all others under like cir- "cumstances are exempted.*"

City of Shreveport vs. Levy (26 La. Ann., p. 671; S. C. 21 Am. Rep., p. 553.): In this case a Sunday law was held unconstitutional because it made an exemption in favor of certain persons who kept Saturday as a day of observance and rest, and was therefore unequal in its operation.

In ex parte Westerfield, 55 Cal., page 550, Sharpstein J. said, respecting a Sunday law applicable to bakers only:

"A general law must include within its sanction all who "come within its purport and scope. It must be as broad "as its object. If it is to be made a crime not to refrain "from labor during the whole or a portion of any given "day of the week, it must be made equally a crime as to all "persons who do not so refrain; or the prohibitory law "must be made applicable *to all of a class*, the members of "which, *for reasons apparent upon mention of the class*, may "at least require, for the benefit of their health, or mor- "als, a period of rest not beneficial to any other class or "individual."

In Clark vs. Free Press, 72 Mich., p. 560, a statute regulating the measure of damages in libel suits against publishers of newspapers was held to be not due process of law, because it was confined to publishers of newspapers, and did not embrace any and all persons who might be sued for libel.

The court said: "It is not competent to give one class "of citizens legal exemptions from liability for wrongs "not granted to others."

In State vs. Goodwell (W. Va.) 10 S. E. Rep., p. 285, a statute which made it unlawful for persons, firms, corporations or associations engaged in any kind of mining or manufacturing to issue orders in payment of their employes, was held void under constitutional provisions substantially the same as those which exist in the Constitution of Texas, on the ground that the statute was discriminatory in character, being confined to employers engaged in mining or manufacturing, and did not embrace all employers.

On similar grounds in the case of State vs. Fire Creek Coal and Coke Co. (W. Va.), 10 S. E. Rep., p. 288, a statute prohibiting employers engaged in mining or manufacturing from selling merchandise to their employes at a greater per cent. of profit than they sold to others not employed by them, was held unconstitutional.

The case of Dibrell vs. Morris' Heirs, Tenn., 15 S. W. Rep., p. 87, involved the constitutionality of a statute which provided that on the death of a *non compos* intestate who had inherited property from a spouse, who died intestate, the property so inherited should go to the next of kin of such spouse to the exclusion of the next kin of the *non compos*, while under the general law of distribution, property inherited by a spouse from an intestate spouse on the death of the former would be inherited by his or her next kin and not by the next of kin of the latter.

The court delivered an able and exhaustive opinion and held the law unconstitutional, clearly setting forth the principle for which we contend, that where a legislature singles out a class for special regulation such regulation must be based on some fact peculiar to that class distinguishing it from all other classes.

" The clause 'law of the land' was defined in our earlier " cases to mean 'a general and public law, equally binding " upon every member of the community;' but by our later " cases it is defined to mean a law 'which embraces all " persons who are or may come into like situation and " circumstances.' Vanzant vs. Waddel, 2 Yerg., pp. " 270-271; Wally vs. Kennedy, id., p. 555; Bank vs. Cooper, " id., p. 605; Jones vs. Perry, 10 Yerg., pp. 71-72; Shep- " pard vs. Johnson, 2 Humph., p. 295; Budd vs. State, 3 " Humph., p. 491; State vs. Burnett, 6 Heisk., p. 189; Mc- " Kinney vs. Hotel Co., 12 Heisk., p. 107; Mayor vs. Dear- " mon, 2 Sneed, p. 122; State vs. Rauscher, 1 Lea, p. 97; " Davis vs. State, 3 Lea, p. 378; Maney vs. State, 6 Lea, p. " 221; Hatcher vs. State, 12 Lea, pp. 370-371; Woodard vs. " Brien, 14 Lea, p. 523. Laws public in their character " and otherwise unobjectionable may extend to all citizens " or be confined to particular classes. Cooley Const. Lim., " p. 390. And it matters not how few the persons are " who may be included in a class. If all who are or who may " come into the like situation and circumstances be em " braced in the law the class is general and not partial."

" Before proceeding to examine those cases it is proper " to notice another limitation which is imposed upon " the legislature in making classifications of citizens. The " limitation is stated by Judge Cooley as follows: 'The " doubt might also arise whether a regulation made for " any one class of citizens, entirely arbitrary in its char- " acter and restricting their rights, privileges or legal ca- " pacities in a manner before unknown to the law, would " be sustained, notwithstanding its generality. Distinc- " tions in these respects must rest upon some reason upon " which they can be defended, like the want of capacity " in infants and insane persons, and if the legislature " should undertake to provide that persons following some " specified lawful trade or employment should not have " capacity to make contracts, or to receive conveyances, " or to build such houses as others were allowed to erect, " or in any other way to make such use of their property " as was permissible to others, it can scarcely be doubted " that the act would transcend the due bonds of legis- " lative power, even though no express constitutional pro- " vision could be pointed out with which it could conflict.

"it was unconstitutional. There were no reasons why the "officers, agents, and servants of that bank should be "subjected to the felony in question, that were not equally "applicable to the officers, agents, and servants of all "other banks. In the case of McKinney vs. Hotel Co., 12 "Heisk., p. 104, an act authorized a certain hotel com- "pany to contract to pay interest at the rate of 10 per "cent. per annum upon a loan of $100,000. The act was "held to be unconstitutional. There were no reasons why "that company should be allowed to contract to pay 10 per "cent. interest that were not equally applicable to all "other companies or individuals who might wish to bor- "row money; and there were no reasons why those who "loaned money to that company should be allowed to "charge 10 per cent. that were not equally applicable to "all money lenders of the State. In Daily vs. State, 13 "Lea, p. 232, an act in effect created as a new privilege, "the right to sell pools on horse races and to limit the "exercise of the privilege to a certain class of private "corporations. This court held the act to be unconsti- "tutional. There were no reasons why those corporations "should be allowed the privilege of selling pools that "were not equally applicable to all other corporations "or individuals in the State who might wish to exercise "that privilege. In Burkholtz vs. State, 16 Lea, pp. 72-73, "an act made it lawful to sell pools, under certain circum- "stances; but it contained a proviso that it should not "apply to counties having a population of not less than "75,000 inhabitants by the United States census last "taken just preceding the date of the offense. Davidson "and Shelby were the ony counties in the State which "had 75,000 inhabitants by the last United States census. "It was held that the act was unconstitutional. There "were no reasons why pool selling should be made lawful "in Davidson and Shelby counties that were not equally "applicable to all other counties of the State. In the "case of Woodward vs. Brien, 14 Lea, pp. 522-523, an act "declared that real estate should not be affected by the "lien of a judgment until an abstract of the judgment "was recorded in the registrar's office; but it contained "a proviso that it should apply only to counties that had "by the census of 1870 a population of not less than 40,-

"000 inhabitants. Davidson and Shelby counties were "the only counties in the State to which the act would "apply. It was held to be unconstitutional. There were "no reasons why judgment liens should be recorded in "those counties that were not equally applicable to all "other counties of the State. In Neely vs. State, 4 Lea, "p. 316, the charter of a railroad company exempted its "directors from jury duty. The exemption was held to "be unconstitutional. There were no reasons why the "directors of that company should be exempted from "jury duty that were not equally applicable to all citizens "of the State. In Green vs. State, 15 Lea, pp. 708-710, an "act provided that fifteen per cent. of the voting popula-"tion of a county might organize into militia and be ex-"empt from jury duty. It was held that the exemption "was unconstitutional. There were no reasons why those "who organized as militia should be exempt from jury "duty that were not equally applicable to all the other "citizens of the State. In Ragio vs. State, 86 Tenn., p. "272, 6 S. W. Rep., p. 410, an act made it a misdemeanor "for any one engaged in the business of a barber to keep "open bath rooms on Sunday. It was held that the act "was unconstitutional. There were no reasons why "barbers should be prohibited from keeping bath rooms "open on Sunday that were not equally applicable to inn "keepers and all other persons who kept and used bath "rooms for profit. We conclude, upon a review of the "cases above referred to, that whether a statute be pub-"lic or private, general or special in form, if it attempts "to create distinctions and classification between the "citizens of this State, the basis of such classification "must be natural, and not arbitrary.

"It will be seen that paragraph three of section 2420 "of the Code applies impartially to all intestates; while "the act of 1885 applies only to lunatic intestates. It is "said that the proportion of lunatics to sane persons is as "but one to a thousand. One objection to special laws is "that they single out one or a few odious or helpless indi-"viduals and undertake to regulate his or their rights by "a rule different from that which is applicable to the "community at large, and by which the great body of the

"people or the legislators themselves would not be willing "to be bound. Wally vs. Kennedy, 2 Yerg., p. 557; Cooley Const. Lim., p. 391.

"There are no reasons why lunatics should be deprived "of the right to transmit their property by inheritance "to their heirs or next of kin, that do not apply equally "to persons who are sane. Suppose Mrs. Gee, who was a "sister of Mrs. Morris, had derived personal property from "an intestate husband, then, upon her death, as she was "sane, the property would go, under the general law to her "next of kin; but, under the act of 1885, the property "which Mrs. Morris derived from her husband must go to "those who are strangers in blood to her. Why should "so important a distinction be made between two sisters? "The only answer which we have heard is that one of "them was sane and the other insane.

"The probability is that there are very few persons in "the State who would answer the description of the "sub-class into which Mrs. Morris was finally forced by "the act of 1885. Assuming, however, that the legis-"lature has the power, in a proper case, to make its classi-"fication as minute as it sees proper, yet we hold that the "classification must 'be natural, not arbitrary.' We "think that the classification made by the act of 1885 is "unnatural, arbitrary, and capricious, and for that reason "we hold it to be unconstitutional."

A statute of Illinois provided that it should be unlawful for any person engaged in mining or manufacturing, or who should engage in or be interested directly or indirectly in mining or manufacturing, to keep a truck store for furnishing supplies, tools, clothing or provisions, to his, its, or their employes, while so engaged in mining or manufacturing.

In the case of Frorer vs. People (Ill.), 31 N. E. Rep., p. 295, the act was held unconstitutional on the ground

that it was directed only against those engaged in the business of manufacturing and mining.

The court said: "There is nothing in operating mines "or manufactories to render the individual less capable "to contract or to give him greater wisdom and adroit- "ness therein, than he would possess were he engaged in "operating and controlling some other branch of industry. "It may be conceded that there is more of dependence "of the employe upon the employer in case of skilled la- "bor, in a special department, because the demand for "such labor is limited in each locality by the number and "size of its industries, than there is in the case of the "general laborer who may find employment anywhere and "everywhere; but mining and manufacturing do not in- "clude all the skilled labor in the country. In construct- "ing roads, in building houses, in the business of commerce "including buying, selling and transportation, and in "other branches of industry, a vast number of skilled "laborers are constantly employed and their relations to "their employers would seem to be under precisely the "same conditions as are those affecting the relations be- "tween operators of mines and manufacturers and their "employes. And, in any view, the extent and degree of "dependence in particular classes of industry can not "affect the general principle, since human nature being "the same in all classes of industry, the effect of equal "degrees of dependence must be the same in each class. "It can not truthfully be said that all operators in mines "or manufactories are more dependent upon their em- "ployers than all laborers in any other branch of industry. "We know from observance that there are instances of "entire destitution and consequently of the dependence "presumed to result therefrom in all branches of industry, "and that in all branches of industry there are varying "degrees of destitution and consequently of the corre- "spondent presumed dependence resulting therefrom. "And so it must follow that any difference between the "business protected by the first section when carried on "by the employer of laborers in mines or manufactories, "and when carried on by the employers of laborers in "other branches of lawful industry can not be one of

"principle, but must be purely one of degree, varying "with the circumstances of particular cases; the injury "from the prohibited business, if in fact it be such, being "of precisely the same kind, whether one or many may be "affected by it. In all that relates to mining and man- "ufacturing wherein they differ from other branches of "industry, we recognized the supremacy of the general "assembly to determine whether any, and if any, what "statute shall be enacted for their welfare, and that of "operators therein and necessarily affecting them alone; "but keeping stores and groceries or supplies of tools, "clothing and food by whatever name, to sell to laborers "in mines and manufactories is entirely independent "of mining and manufacturing and has no tendency in "any possible way to affect the mechanical process of "mining and manufacturing. The prohibition of the "statute operates not directly upon the business of min- "ing and manufacturing, but upon the individual, be- "cause of his participation in that business. It is not "imposed for the purpose of rendering mining and man- "ufacturing less perilous or laborious, nor to restrict or "regulate the duties of employer and employe in respects "peculiar to those industries, but for the sole purpose "of imposing disabilities in contracting as to tools, cloth- "ing and food matters about which all laborers must con- "tract and as to which all laborers in every branch of "industry are permitted to contract with their employers "without restriction.

"In assuming then that the keeping of a truck store "or controlling of a store, shop or scheme for the furnish- "ing of supplies, tools, clothing, provisions or groceries "to his employes by the person carrying on the business "of mining or manufacturing is not in principle, a dif- "ferent thing from what it is when kept or controlled by "persons employing laborers in different branches of la- "bor, it is, if these sections are law, now lawful for any "person or corporation other than one engaged in min- "ing and manufacturing to engage or be interested di- "rectly in keeping a truck store or controlling a store, "shop or scheme for the furnishing of supplies, tools "clothing, provisions or groceries to his employes, while

"a person engaged in mining and manufacturing is, be-
"cause of that fact alone, prohibited from doing so. The
"privilege or liberty to engage in or control the business
"of keeping and selling clothing, provisions, groceries,
"tools, etc., to employes is one of profit, of presumptive
"value; and thus, by the effect of these sections, what the
"employers in other industries may do for the pecuniary
"gain with impunity and have the law to protect and en-
"force, the miner and manufacturer under precisely the
"same circumstances and conditions, are prohibited from
"doing for their pecuniary gain. The same act in sub-
"stance and in principle, if done by one is lawful, but
"if done by the other is not only unlawful, but a misde-
"meanor punishable by fine.

"If the general assembly may thus deprive some per-
"sons of substantial privileges allowed to other persons
"under precisely the same conditions, it is manifest that
"it may, upon like principle, deprive still other persons
"of other privileges in contracting, which, under precisely
"the same circumstances, are enjoyed by all but the pro-
"hibited class; and it can hardly be admissible that the
"legislative determination that the facts are such as to
"warrant this discrimination is conclusive, for that would
"make the general assembly omnipotent, since, if that
"were so, there could be nothing but its own discretion to
"control its action in regard to every liberty enjoyed by
"the citizen; and it might find that the public welfare
"required that society should be divided into an indefinite
"number of classes, each possessing or being denied priv-
"ileges in contracting and acquiring property as favor-
"itism or caprice might dictate. The privilege of con-
"tracting is both a liberty and a property right, and if A is
"denied the right to contract and acquire property in a
"manner which he has hitherto enjoyed under the law,
"and which B, C and D are still allowed by the law to en-
"joy, it is clear that he is deprived of both liberty and
"property to the extent that he is thus denied the right
"to contract." (31 N. E. Rep., pp. 396-397.)

The opinion is an able one, and in other portions, not quoted, reviews many authorities.

In State vs. Scougal, (So. Dak.) 58 N. W. Rep., p. 858, a statute which provided for the organization of banking associations or companies and prohibited individuals who did not comply with the terms of the act from engaging in the banking business, was held unconstitutional in so far as such prohibition was concerned.

In case of Railway Company vs. Wilson, 19 S. W. Rep., p. 911, decided by the then Court of Appeals of Texas, an act of the legislature making railroad companies liable for a penalty for not paying their employes in a specified time, was held unconstitutional, because not due process of law.

In Eden vs. People, Ills. Sup. Court, May 12, 1896, 43 N. E. Rep., p. 1108, it was held that an act prohibiting barbers opening their shops on Sunday was void, because it violated the due process of law clause of the State and Federal Constitution. The court said:

"It is contended in the argument that by the act in "question that part of the fourteenth amendment to the "United States Constitution (section 1) has been violated, "which reads as follows: 'Nor shall any State deprive "any person of life, liberty, or property, without due "process of law, nor deny to any person within its juris-"diction the equal protection of the laws.' It is also con-"tended that the act violates the following sections of the "Illinois Constitution of 1870, to-wit: Article 2, section "2: 'No person shall be deprived of life, liberty or prop-"erty without due process of law.' Also article 4, section "22, the general clause of which reads: 'In all cases "where a general law can be made applicable, no special "law shall be enacted.' It is conceded in the argument "that if the legislature had enacted a law prohibiting all "business on Sunday, its validity could not be questioned; "that such a law would violate none of the constitutional "provisions relied upon. * * * Under the law of this

"State as it existed prior to the passage of the act in ques-
"tion, each and every citizen of the State was left per-
"fectly free to labor and transact business on Sunday or
"refrain from labor and business, as he might choose, so
"long as he did not disturb the peace and good order of
"society. By the act in question an attempt has been
"made by the legislature to inaugurate a radical change
"in the law as to a class of the laboring element of the
"State, the barbers. * * * The Constitution of the
"United States says the State shall not deprive any per-
"son of property without due process of law and our
"State Constitution declares the same thing. What is
"understood by the term 'due process of law' is not an
"open question. 'Due process of law' is synonymous with
"law of the land' and the law of the land is 'general public
"law, binding upon all the members of the community,
"under all circumstances, and not partial or private laws,
"affecting the rights of private individuals or classes of
"individuals.' Millett vs. People, 117 Ill., p. 294, 7 N. E.,
"p. 631. Is the act in question alone binding upon all
"the members of the community? A glance at its pro-
"visions affords a negative answer. The act affects one
"class of laborers, and one class alone. The merchant and
"his clerks, the restaurant with its employes, the cloth-
"ing house, the blacksmith, the livery stable, the street
"car lines, and the people engaged in every other branch
"of business, are each and all allowed to open their re-
"spective places of business on Sunday and transact their
"ordinary business if they desire, but the barber, and
"he alone, is required to close his place of business. The
"barber is thus deprived of property without due process
"of law, in direct violation of the Constitution of the
"United States and of this State. * * * In Frorer vs.
"People, 141 Ill., p. 171, 31 N. E., p 395, where the va-
"lidity of an act of the legislature arose which prohibited
"persons engaged in mining or manufacturing business
"from keeping a store for furnishing supplies, tools,
"clothing, provisions or groceries to their employes while
"so engaged in mining or manufacturing, the law was
"held to be in conflict with the Constitution. In the de-
"cision of the case it is, among other things, said: 'The
"privilege or liberty to engage in or control the business

"of keeping and selling clothing, provisions, groceries, "etc., to employes is one of profit, and thus, by the effect "of these sections, what the employers in other industries "may do for their pecuniary gain with impunity, and "have the law to protect and enforce, the miner and man- "ufacturer, under precisely the same circumstances and "conditions, are prohibited from doing for their pecuniary "gain. The same act, in substance, and in principle, if "done by the one, is unlawful; but if done by the other, "is not only unlawful, but a misdemeanor. * * * The "privilege of contracting is both a liberty and a property "right, and if A is denied the right to contract and ac- "quire property in a manner which he has hitherto en- "joyed under the law, and which B and C are thus al- "lowed by the law to enjoy, it is clear that he is deprived "of both liberty and property to the extent that he is "thus denied the right to contract.' In Ramsey vs. Peo- "ple, (Ill. Sup.) 32 N. E., p. 364, the case last cited was "quoted with approval, and it was held that the act of "1881, which requires the owners and operators of coal "mines, when the miner is paid on the basis of the amount "of coal mined and delivered by him, to weigh the coal in "pit, and before it is screened, and to pay on such weights, "is in violation of section 2, article 2, of the State Con- "stitution, as depriving a class of persons of the liberty "and property right of making contract without due pro- "cess of law. In Braceville Coal Co. vs. People, 147 Ill., "p. 66, 35 N. E., p. 62, the question of the validity of an "act of the legislature arose which required certain speci- "fied corporations to pay their employes their wages "weekly. It was held that, as the act was applicable only "to certain corporations, and did not operate upon all "corporations for pecuniary profit, and individuals, it "was unconstitutional, as depriving the corporations af- "fected thereby of the right of liberty and property with- "out due process of law. In speaking of the term 'lib- "erty' as used in the Constitution, it is there said: 'There "can be no liberty protected by government that is not "regulated by such laws as will preserve the right of each "citizen to procure his own advancement in his own way "subject only to the restraint necessary to secure the "same rights to all others. The fundamental

"principle upon which liberty is based is "equality under the law. It has accordingly "been held that liberty, as that term is used in the Con- "stitution, means not only freedom of the citizen from "servitude and restraint, but is deemed to enhance the "right of every man to be free in the use of his powers "and faculties, and to adopt and pursue such avocation "or calling as he may choose, subject only to the restraints "necessary to secure the common welfare.' In Ritchie "vs. People, 155 Ill., p. 101, 40 N. E., p. 454, the question "arose in regard to the validity of a statute which pro- "vided that no female shall be employed in any factory or "workshop more than eight hours in any one day, or "forty-eight hours in any one week, and it was held that "the right to labor or employ labor and make contracts "in respect thereto, upon such terms as may be agreed "upon, is both a liberty and a property right, and is in- "cluded in the guaranty of section 2, article 2, of the Con- "stitution; that the act prohibiting the employment of "females in any factory or workshop for more than eight "hours a day is unconstitutional, as being partial and "discriminating in its character. In the decision of the "case it is said: 'Labor is property, and the laborer has "the same right to sell his labor, and to contract with "reference thereto, as has any other property owner. "In this country the legislature has no power to prevent "persons who are sui juris from making their contracts, "nor can it interfere with the freedom of contract between "the workman and the employer.' If the legislature has "no power to prohibit by law a woman from being em- "ployed in a factory or workshop more than eight hours in "any one day, or forty-eight hours in a week, upon what "principle, it may be asked, has the legislature the right "to prohibit a barber from laboring and receiving the "fruits of his labor during any number of hours he may "desire to work during the week. If a woman may be "allowed to determine the number of hours she may work "in a week, why not allow a barber the same right? "Moreover, if the merchant, the grocer, the butcher, and "druggist, and other trades and callings are allowed to "open their places of business and carry on their respec- "tive avocations during seven days of the week, upon

"what principle can it be held that a person who may "be engaged in the business of barbering may not do the "same thing? Why should a discrimination be made "against that calling, and that alone? * * * If the "public welfare of the State demand that all business and "all labor of every description except work of necessity "and charity should cease on Sunday, the first day of the "week, and that day shall be kept as a day of rest, the "legislature has the power to enact a law requiring all "persons to refrain from their ordinary callings on that "day (Cooley Const. Lim., p. 725); and in order that Sun "day may be kept as a day of rest then all will be placed "on a perfect equality, and no one can complain of an "unjust discrimination. But when the legislature under "takes to single out one class of labor, harmless in itself, "condemn that, and that alone, it transcends its legiti "mate powers and its action can not be sustained." (pp. 1108-1111.

A similar conclusion was reached in the recent case of ex parte Jentzsch, 44 Pac. Rep., p. 803, where the court said:

"*A law is not always general because it operates upon all "within a class. There must be back of that a substantial "reason why it is made to operate only upon a class, and not "generally upon all.* As was said in Pasadena vs. Simp- "son, 91 Cal., p. 238, 27 Pac., p. 604: 'The conclusion is "that, although a law is general and constitutional when "it applies equally to all persons embraced in a class "founded upon some natural or intrinsic or constitutional "distinction, it is not general or constitutional if it confers "particular privileges or imposes peculiar disabilities or "burdensome conditions in the exercise of a common right "upon a class of persons arbitrarily selected from the gen- "eal body of those who stand in precisely the same re- "lation to the subject of the law.' And in Darcy vs. City "of San Jose, 104 Cal., p. 642, 38 Pac., p. 500: 'The classi- "fication, however, must be founded upon differences "which are either defined by the Constitution or natural, "and which will suggest a reason which might rationally

"be held to justify the diversity of legislation.' In the "case of our cities the Constitution itself decrees a classi- "fication by population, and the differing exigencies of "municipal government require that laws operating upon "any class should be held general; otherwise the constitu- "tional scheme itself is overthrown. But in a law such "as this no reason has been or can be shown why the fol- "lowers of one useful and unobjectionable employment "should be debarred from the right to labor upon certain "days, and others in like classes of employment be not "so debarred. If it be constitutional to single out one "such class and debar its members from the right to labor "on one day in the week, it would be constitutional to "prohibit them from following their vocation upon the "six days of the week. When any one such class is sin- "gled out and put under the criminal ban of a law, such "as this, the law not only is special, unjust and unreason- "able in its operation, but it works an invasion of individ- "ual liberty, the liberty of free labor, which it pretends "to protect." (pp. 804-805.)

Wheeling Bridge & T. Co. vs. Gilmore, 8 Ohio Cir. C. R., p. 658, American Digest for 1895, p. 778, section 251: "Act "March 26, 1890, section 1, as amended by Act April 23, "1891, and Act April 15, 1892, declaring ten hours shall "constitute a day's work for certain classes of railroad "employes, and that for any time in excess thereof that "any such employes shall work, under the direction of a "superior or at the request of the company he shall be "paid in addition to his per diem, is in conflict with the "Constitution of the United States, article 14, section 1, "providing that no person shall be deprived of property "without due process of law or denied the equal protec- "tion of the law."

In State vs. Loomis, 115 Mo., p. 307, 22 S. W. Rep., p. 350, it was held that an act of the legislature applying only to persons or corporations engaged in manufacturing or mining prohibiting the issue for the payment of wages, any order, check or other

token of indebtedness payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value or in goods, at the option of the holder, was void, because in violation of the due process of law clause of the State and Federal Constitution.

Black, C. J., said: "Some of the cases just cited cannot be distinguished from this one. In others there is some difference in the facts and in the statutes considered, and in some of them the constitutional provisions use different words from the clauses of our Constitution before set out; but the cases just cited are all in point of principle like the one in hand. The differences, such as they are, strengthen rather than weaken the conclusion which we have heretofore expressed, for it must be evident that they all teach this doctrine; that constitutional declarations concerning the liberty of the citizens, though using different words, are not to be reduced to an empty sound. Liberty, we have seen, includes the right to acquire property, and that means and includes the right to make and enforce contracts. We do not say that such rights can not be regulated by general law, but we do say that the legislature can not single out one class of persons who are competent to contract, and deprive them of rights in that respect which are accorded to other persons. The constitutional declaration that 'no person shall be deprived of life, liberty or property without due process of law' was designed to protect and preserve their existing rights against arbitrary legislation, as well as against arbitrary executive and judicial acts. The sections of our statute in question deprive a class of persons of the right to make and enforce ordinary contracts, and they introduce a system of paternalism which is at war with the fundamental principles of our government, and, as we have before said are not due process of law." (p. 353.)

In Pierce vs. City of Portland, 69 Me., p. 278, a provision in a statute that plaintiffs in suits for damages against the city on account of defective streets or sidewalks could

not recover unless a recovery could be had on similar facts in the country whereof the plaintiff was a citizen, was held unconstitutional, because it deprived that class of persons who were citizens of countries where such actions could not be maintained of the equal protection of the law. The court said that it would be competent for the legislature to repeal the law permitting a recovery of damages in that character of cases,but as long as the statute allowing recovery of such damages exists, it could not exclude from its benefits any class of persons.

In those cases (Ziegler vs. Railway company., 58 Ala., p. 594, referred to with approval in Texas Central Railway company vs. Childress, 64 Texas, p. 340; Oregon Railway and Navigation company vs. Smalley, (Utah) 42, A. and E. R. R. Cases, p. 550; Beilenburg vs. Montana Railway Co., (Mont.), 38 A and E. R. R. Cases, p. 275; Jenson vs. U. P. Railway Co., Utah, 38 A. and E. R. R. Cases, p. 279; Cottrell vs. U. P. Railway Co., 21 Pac. Rep., p. 416; Schenck vs. U. P. Railway Co., (Wyo.) 4 Pacific R., p. 840), in which it was held that the legislature can not impose absolute liability on railway companies for stock killed without fault, while the point may not be clearly brought out, it is evident that the statutes were held unconstitutional, because partial and special; for it is not perceived that a statute applying to all persons, imposing liability for damge done in the movement of the person or in the conduct of business without regard to any question of negligence or fault, would be subject to constitutional objections. In other words, that a law general in its application, which eliminated the question of negligence and enacted that where one of two innocent parties had to sustain a loss it should be borne by the one whose agency caused it, would not be unconstitutional.

In the case of Grissell vs. Housatonic Ry., Conn., 32 A.

and E. R. R. Cases, where it was held that the statute imposing absolute liabilty on railway companies for fires started by their engines was constitutional, the principle here contended for was conceded, viz: That a burden can not be cast on railway corporations from which all others are exempt under similar circumstances, and the decision was rested on the ground that the case of railway companies operating their flying engines over the country on a narrow strip of land, peculiar to them, and which they alone could acquire, and from the border of which the property owner could not in the nature of things remove his property, etc., presented a case dissimilar in circumstances to fires which might be caused in other modes.

Whether the conclusion reached in the manner indicated is correct, is not pertinent to the present inquiry.

While we believe that a case fairly demanding the enunciation of these principles has not been presented in this Court, yet we think it is manifest from repeated expressions in Its opinions that in Its judgment a statute applying to a particular class of persons which does not apply to others under like circumstances, is not due process of law and does not afford equal protection of law; and that to justify the restriction of an act to a single class, it must be based on some reason or fact which distinguishes that class from others, and can not be maintained as constitutional if it be founded on some fact or reason not peculiar to such class, but which exists generally with reference to all others.

"But it is not to be supposed that these legislative "powers are absolute and despotic, and that the amend- "ment prescribing due process of law is too vague and "indefinite to operate as a practical restraint. It is not "every act, legislative in form, that is law. Law is some-

"thing more than mere will exerted as an act of power. "It must not be a special rule for a particular person or a "particular case, but, in the language of Mr. Webster in "his familiar definition, 'the general law, a law which "hears before it condemns, which proceeds upon inquiry "and renders judgment only after trial,' so 'that every "citizen shall hold his life, liberty, property and immuni- "ties *under the protection of the general rules* which govern "society,' and thus excluding, as not due process of law, "acts of attainder, bills of pain and penalties, acts of con- "fiscation, acts reversing judgments, and acts directly "transferring one man's estate to another, legislative "judgments and decrees, and other similar special, par- "tial and arbitrary exertions of power under the forms of "legislation. Arbitrary power, enforcing its edicts to the "injury of the persons and property of its subjects is not "law, whether manifested as the decree of a personal "monarch or of an impersonal multitude. And the limi- "tations imposed by our constitutional law upon the ac- "tion of the governments, both State and National, are "essential to the preservation of public and private "rights, notwithstanding the representative character of "our political institutions. The enforcement of these lim- "itations by judicial process is the device of self-govern- "ing communities to protect the rights of individuals and "minorities, as well against the power of numbers as "against the violence of public agents transcending the "limits of lawful authority, even when acting in the name "and wielding the force of the government." (Hurtado vs. State, 110 U. S., p. 535.)

"The fourteenth amendment, in declaring that no State "'shall deprive any person of life, liberty or property "without due process of law, nor deny to any person "within its jurisdiction the equal protection of the laws,' "undoubtedly intended not only that there should be no "arbitrary deprivation of life or liberty, or arbitrary "spoilation of property, *but that equal protection and secur- "ity should be given to all under like circumstances in the "enjoyment of their personal and civil rights*; that all per- "sons should be equally entitled to pursue their happiness "and acquire and enjoy property; that they should have "like access to the courts of the country for the protec-

"tection of their persons and property, the prevention
"and redress of wrongs and the enforcements of con-
"tracts; *that no impediment should be interposed to the pur-*
"*suits of any one except as applied to the same pursuits by*
"*others under like circumstances; that no greater burdens*
"*should be laid upon one than are laid upon others in the*
"*same calling and condition*, and that in the administra-
"tion of criminal justice no different or higher punish-
"ment should be imposed upon one than such as is pre-
"scribed for all like offenses. But neither the amend-
"ment, broad and comprehensive as it is, nor any other
"amendment was designed to interfere with the power
"of the State, some times termed its police power, to pre-
"scribe regulations to promote the health, peace, morals,
"education and good order of the people and to legislate
"so as to increase the industries of the State, develop its
"resources and add to its wealth and prosperity. From
"the very necessities of society, legislation of a special
"character having these objects in view must often be
"had in districts, such as for draining marshes and irri-
"gating arid plains. Special burdens are often necessary
"for general benefits—for supplying water, preventing
"fires, lighting districts, cleaning streets, opening parks
"and many other objects. Regulations for these pur-
"poses may press with more or less weight upon one than
"another, but they are designed not to impose unequal or
"unnecessary restrictions upon any one, but to promote
"with as little individual inconvenience as possible, the
"general good. Though in many respects, necessarily
"special in their character, they do not furnish just
"ground of complaint if they operate *alike upon all per-*
"*sons and property under the same circumstances and con-*
"*ditions. Class legislation*, discriminating against some
"and favoring others, is prohibited, but legislation which,
"in carrying out a public purpose, is limited in its appli-
"cation, if within the sphere of its operation, it affects
"alike *all persons similarly situated*, is not within the
"amendment." (Barbier vs. Connolly, 113 U. S., p. 27.)

"Such legislation is not obnoxious to the last clause of
"the Fourteenth Amendment, *if all persons subject to it*
"*are treated alike under similar circumstances and conditions*
"*in respect both of the privileges conferred and the liabilities*

"*imposed*. It is conceded that corporations are persons "within the meaning of the amendment. Santa Clara "County vs. Southern Pacific Railroad company, 118 U. S., "p. 394; Pembina Consolidated Silver Mining and Milling "Co. vs. Pennsylvania, 125 U. S., p. 187. But the hazard- "ous character of the business of operating a railway "would seem to call for special legislation with respect "to railroad corporations, having for its object the pro- "tection of their employes, as well as the safety of the "public. *The business of other corporations is not subject to "similar dangers to their employes*, and no objections "therefore, can be made to the legislation on the ground "of its making an unjust discrimination." (Missouri Rail- "way vs. Mackay, 127 U. S., p. 205.)

"By the Fourteenth Amendment the powers of the "States in dealing with crime within their borders are not "limited, but no State can *deprive particular persons or "classes of persons of equal and impartial justice under the "law*. Law, in its regular course of administration "through courts of justice, is due process, and when se- "cured by the law of the State, the constitutional requisi- "tion is satisfied. 2 Kent. Comm., p. 13. And due process "*is so secured by laws operating on all alike* and not subject "ing the individual to the arbitrary exercise of the pow- "ers of government, unrestrained by the established prin- "ciples of private right and distributive justice. Bank "of Columbia vs. Okley, 4 Wheat., pp 235-244. The power "of the State must be exerted within the limits of those "principles, and its exertion can not be sustained when "special, partial and arbitrary." (Hurtado vs. California, 110 U. S., pp. 516-535.)

"That by the Fourteenth Amendment the powers of "States in dealing with crime within their borders are "not limited, except that no State can deprive particular "persons *or classes of persons of equal and impartial justice "under the law*; the law in its regular course of administra- "tion through the courts of justice is due process, and "when secured by the law of the State the constitutional "requirement is satisfied; *and that due process is so secured*

"*by laws operating on all alike*, and not subjecting the in-
"dividual to the arbitrary exercise of the powers of gov-
"ernment unrestrained by the established principles of
"private and distributive justice. Hurtado vs. Califor-
"nia, 110 U. S., pp. 516-535, and cases cited." (Leeper vs. State, 139 U. S., p. 468.)

The Constitution of California of 1879 provided that in the assessment of mortgaged property, the amount of the mortgage should be deducted from the assessed value of the property and the mortgagor assessed for the residue, but that in the assessment of property of railroad companies, the full value of the property should be assessed against the railroad company without deducting the amount for which it might be mortgaged.

In County of San Mateo vs. Southern Pacific Railway Co., 8 A. & E. R. R. Cases, p. 1, and in Santa Clara County vs. Southern Pacific Railway Co., 13 A. & E. R. Cases, p. 182, it was held that so much of the Constitution of California which provided that in the assessment of the property of the railroad company no deduction should be made of the amount of mortgages thereon, was in violation of the Fourteenth Amendment to the Federal Constitution.

Elaborate opinions were delivered by Mr. Justice Field and Sawyer, J.

In the former case, Mr. Justice Field said: "The Four-
"teenth amendment of the Constitution in declaring that
"no State shall deny to any person within its jurisdiction
"the equal protection of the laws, imposes a limitation
"upon the exercise of all the powers of the State, which
"can touch the individual or his property including among
"them that of taxation. Whatever the State may do, it
"can not deprive any one within its jurisdiction of the
"equal protection of the laws. And by equal protection of

" the laws is meant equal security under them to every one
" of similar terms, in his life, his liberty, his property, and in
" the pursuit of happiness. It not only implies the right
" of each to resort, on the same terms with others, to the
" courts of the country for the security of his person and
" property, the prevention and redress of wrongs and the
" enforcement of contracts, but also his exemption *from*
" *any greater burdens or charges than such as are equally*
" *imposed upon all others under like circumstances.*"

These and other cases raising the same questions were brought to this court, but were decided in favor of the railway companies on other grounds, the Court declining to pass on the constitutional question, because its decision was not imperatively demanded by the record.

In the case of San Bernardino vs. Southern Pacific Ry. Co., 118 U. S., p. 423, Mr. Justice Field in a concurring opinion said:

" The question is of transcendent importance, and it will
" come here and continue to come until authoritatively de-
" cided in harmony with the great constitutional amend-
" ment which insures to every person, whatever his posi-
" tion or association, the equal protection of the laws; and
" that necessarily implies freedom from the imposition
" of unequal burdens under the same conditions. (Barbier
" vs. Connolly, 113 U. S., pp. 27-31.)

" Much as I regret that the question could not now be
" decided, I recognize fully the wisdom of the rule that
" the constitutionality of State legislation will not be con-
" sidered by the court, unless by the case presented its con-
" sideration is imperatively required."

In the Stockton laundry case, 26 Fed. Rep., p. 611, it was held that the city ordinance which prohibited the operation of any public laundry within the city limits, without

making any provision for determining whether such laundries were nuisances or otherwise offensive, violated the fourteenth amendment, although the constitution of California authorized the city to make all such police, sanitary and other regulations as were not in conflict with the general law.

We think we have shown that an act of the legislature which imposes penalties or liabilities on particular citizens or classes of citizens, which are not imposed on all others, where the same reasons exist, is not due process of law. Then is this case obnoxious to such doctrine? It has been so adjudicated.

The legislature of Nebraska enacted that any railway company which failed to pay for stock killed in thirty days after demand should be liable to the owner for double the value of the stock, no reference being made in the act to fencing and no requirement that the railway companies should fence their tracks. In Railroad Co. vs. Beatty, 6 Neb., p. 37, the court held the act unconstitutional on the ground among others that it provided a penalty for the failure of railway companies to pay for cattle killed within thirty days, without applying it to others under the same circumstances, and hence that it was partial and not the law of the land, and in violation of the due process of law clause of the Constitution.

We regard the opinion as able and philosophic and can not do justice to it by partial quotation.

The code of Alabama provided that any corporation or person owning or controlling any railroad in this State, or any complainant against such corporation, person or persons, taking an appeal from a decision rendered by a

justice of the peace, in a suit for damages brought under the provisions of section 1711, and failing to sustain such appeal or to reduce or increase the judgment before the appellate court, should be liable for a reasonable attorney fee incurred by such an appeal, to be assessed by the court, not to exceed $20.00.

In 1880, in the case of Railroad Company vs. Morris, 65 Ala., p. 193, in a suit against a railroad for killing a hog, the court said:

"The clear legal effect of these provisions is to place "all persons, natural or corporate, as near as practicable "upon a basis of equality in the enforcement and defense "of their rights in courts of justice in this State, except "so far as may be otherwise provided in the Constitution. "This right, though subject to legislative regulation, can "not be impaired or destroyed under the guise or device "of being regulated. Justice can not be sold or denied "by the exaction of a pecuniary consideration for its en- "joyment from one, when it is given freely and open- "handed to another without money and without price. "Nor can it be permitted that litigants shall be debarred "from the free exercise of this constitutional right by the "imposition of arbitrary, unjust and odious discrimina- "tions, perpetrated under color of establishing peculiar "rules for a particular occupation. Unequal, partial dis- "criminatory legislation, which secures this right to some "favored class or classes and denies it to others, who are "thus excluded from that equal protection designed to "be secured by the general law of the land, is in clear and "manifest opposition to the letter and spirit of the fore- "going constitutional provision.

"It was forcibly said by the Supreme Court of Ten- "nessee, in Wally vs. Kennedy (2 Yerger, p. 554):

"'The right of every individual must stand or fall by the "same rule or law that governs every other member of the

"body politic, or land, under similar circumstances; and "every partial or private law which directly proposes to "destroy or affect individual rights, or does the same "thing by affording remedies leading to similar conse- "quences, is unconstitutional and void. Were it other- "wise, odious individuals and corporations would be gov- "erned by one law, and the mass of the community and "those who made the law by another; whereas, the like "general law, affecting the whole community equally, "could not have been passed.'

"In Holden vs. James, 11 Mass., p. 396 (6 Amer. Dic., p. "174), the Supreme Court of Massachusetts said:

"'It is manifestly contrary to the first principles of civil "liberty and natural justice and to the spirit of our Con- "stitution and laws, that any one citizen should enjoy "privileges and advantages which are denied to all others "under like circumstances, or that one should be subject "to losses, damages, suit or action from which all oth- "ers, under like circumstances, are exempted.'

"The section of the code under consideration (1715) pre- "scribes a regulation of a peculiar and discriminative "character in reference to certain appeals from justices "of the peace. It is not general in its provisions, or ap- "plicable to all persons, but is confined to such as own "or control railroads only; and it varies from the general "law of the land by requiring the unsuccessful appellant "in this particular class of cases to pay an attorney's tax "fee, not exceeding $20.00. A law which would require "all farmers who raise cotton to pay such a fee, in cases "where cotton was the subject matter of litigation, and "the owners of this staple were parties to the suit would "be so discriminating in its nature as to appear manifestly "unconstitutional; and one which, should it confine the "tax alone to physicians, or merchants, or ministers of the "gospel, would be glaring in its obnoxious repugnancy "to those cardinal principles of free government which "are found incorporated, perhaps, in the bill of rights of "every State Constitution of the various commonwealths

"of the American government. We think this section of "the code is antagonistic to these provisions of the State "Constitution, and is void. (Durkee vs. City of Janesville, "28 Wis., p. 464; Gordon vs. Winchester Association, 12 "Bush., p. 110; Greene vs. Briggs, 1 Curtis, p. 327; Coo- "ley's Const. Lim. (3d ed.), p. 393.)

"The section in question is also violative of that clause "in section 1, article 4, of the Constitution of the United "States, which declares that no State shall 'deny to any "person within its jurisdiction the equal protection of its "laws.' This guaranty was said by Justice Bradley, in "Missouri vs. Lewis, 101 U. S. (1 Otto), pp. 22-30, to in- "clude 'the equal right to resort to the appropriate courts "for redress.' 'It means,' as was further said by the "court, 'that no person or class of persons should be de- "nied the same protection which is enjoyed by other per- "sons or other classes in the same place and under like "circumstances.'

"The same court, in United States vs. Cruikshank, 92 "U. S. (2 Otto), pp. 542-555, per Waite, C. J., used the fol- "lowing language in discussing the foregoing constitu- "tional clause: 'The equality of the rights of citizens is "a principle of republicanism. Every republican govern- "ment is in duty bound to protect all of its citizens in the "enjoyment of this principle, if within its power. That "duty was originally assumed by the States, and it still "remains there.' (Ward vs. Flood, 48 California, p. 36)"

The next in point of time is the case of Railroad Company vs. Morse, 60 Miss., p. 641, decided in 1882. The statute of Mississippi declared in substance that whenever an appeal should be taken from the judgment of any court in any action for damages brought by any citizen of the State against any corporation, and the judgment in the appellate court should be affirmed, the appellee should recover attorney's fees, the amount of which was to be fixed by the lower court, provided that in appeal from the jus-

tice courts it should not be less than $15.00, and should not be less than $25.00 in appeals from circuit courts. The court said:

"All litigants, whether plaintiff or defendant, should be "regarded with equal favor by the law and before the "tribunals for administering it, and should have the same "right to appeal with others similarly situated. All must "have the equal protection of the law and its instrumen- "talities. The same rule must exist for all in the same "circumstances.

"There may be different rules for appeals and their "incidents in different classes of cases determined by their "nature and subjects, but not with respect to the persons "by or against whom they are instituted.

'The subjection of every unsuccessful appellant to a "charge for the fee of the attorney for the appellee would "afford no ground for complaint as unequal, for it would "operate on all, and such a rule for the unsuccessful ap- "pellant in certain causes of action, tested by the nature "and subject of the actions, will be equally free from ob- "jection on the ground of its discriminating character; "but to say that, where certain persons are plaintiffs and "certain persons are defendants, the unsuccessful ap- "pellant shall be subjected to burdens not imposed on "unsuccessful appellants generally is to deny the equal "protection of the law to the party thus discriminated "against. It is to debar certain persons from prosecuting "a civil cause before the appellate tribunals of this State.

"It is an unwarrantable interference with the 'due "course of law' prescribed for litigants generally."

(Here the court quoted at length from Railroad Company vs. Morris, and Durkee vs. Janesville.)

"It is doubtless true that the act was designed for the "relief of citizens who became litigants in actions against

"corporations, because it applies only when a citizen is "plaintiff, *and it was assumed that the corporation would* "*be appellant, and to avoid discrimination between parties to* "*the same action it was made to operate on either party as* "*appellant*, but it sometimes occurs, and may very often, "that the citizen plaintiff is an appellant, and in such "cases the discrimination may operate oppressively on "him. (Italics ours.)

"The Supreme Court of Alabama declared its act vio- "lative of the Constitution of that State and of the "United States, because of its unjust discrimination in "establishing peculiar rules for a particular occupation, "i. e., such as own or control railroads.

"Our objection to the act under consideration is broader, "as shown above, embracing in its scope the right of a "citizen who sues a corporation, for whom we assert the "right to appeal on the same terms granted to the plain- "tiffs in like cases, i. e., actions for damages against whom- "soever brought.

"The act was intended to deter from the appellate court "corporations against whom judgments should be ren- "dered for damages, or citizens of this State suing them "for damages. It was conceived in hostility to citizens "as plaintiffs or corporations as defendants in such ac- "tions. In either view it is partial and discriminating "against classes of litigants, denying them access to the "appellate courts on the same terms and with the same in- "cidents as other litigants who may be plaintiffs or de- "fendants in actions for damages. It is not applicable to "all suitors alike in the class of actions mentioned by it.

* * * * * * * *

"An act, 'which is partial in its operations, intended "to affect particular individuals alone or to deprive them "of the benefit of the general laws, is unwarranted by the "Constitution and is void.' 'A partial law, tending direct- "ly or indirectly to deprive a corporation or an individual "of rights to property, or to the equal benefits of the gen- "eral laws of the land, is unconstitutional and void."

A statute of Arkansas provided for the selection of arbitrators by the owners of the stock killed and the rail road company who should be required to assess the value of the stock killed. That in the event the railroad company, within thirty days, failed to tender the amount so assessed to the owner, and in any subsequent suit for the value of the stock, in which the owner should recover, reasonable attorney's fees should be taxed against the railroad company. In the event the owner refused to accept the amount tendered and afterwards sued, if he failed to recover a greater amount than that assessed by the arbitrators, reasonable attorney's fees should be taxed against him.

In the case of Railroad Company vs. Williams, 31 A. and E. R. R. Cases, p. 555, the Supreme Court of Arkansas construed the provision allowing attorney's fees to be, in effect, a penalty for failure to abide by the award of the arbitrators, and held the act unconstitutional. The court said:

"Eeveryone is entitled, under the Constitution, to have "his rights enforced, his wrongs redressed and his liabil- "ties determined in the courts whenever it becomes neces- "sary to compel their enforcement, redress or adjust- "ment, and when he is liable for damages, as the appellant "is in this case, to have the damages he shall pay as "sessed by a jury. The legislature has no power to substi- "tute boards of arbitration for the courts without the "consent of the parties, and to make their awards oblig- "atory, and the exercise of the right to seek the aid of the "courts to obtain relief a wrong, or impose upon any one "a penalty for exercising such right."

The statute of Michigan authorized the allowance of attorney's fees where the plaintiff recovered in a suit for killing stock. In Wilder vs. R. R. Co., 35 A. and E. R. R.

Cases, p. 162, the statute was held unconstitutional. The court said:

"But the imposing of the attorney's fee of $25.00 as "costs can not be upheld. The legislature can not make "unjust distinctions between classes of suitors without "violating the spirit of the Constitution. Corporations "have equal rights with natural persons as far as their "privileges in the courts are concerned. They can sue "and defend in all courts the same as natural persons, and "the law must be administered as to them with the same "equality and justice which it bestows upon every suitor, "and without which the machinery of the law becomes "the engine of tyranny. This statute proposes to punish "a railroad company for defending a suit brought against "it with a penalty of $25.00, if it fails to successfully main- "tain its defense. The individual sues for the loss of his "cow, and if it is shown that such loss was occasioned by "his own neglect,and through no fault of the company,and "he thereby loses his suit, the railroad company can re- "cover only the ordinary statute costs of $10.00 in justice "court; but if he succeeds because of the negligence of "the company, the plaintiff is permitted to tax the $10.00 "and an additional penalty of $25.00, for it is nothing more "nor less than a penalty. Calling it an 'attorney fee' "does not change its real nature or effect. It is a punish- "ment to the company and a reward to the plaintiff, and "an incentive to litigation on his part. This inequity and "injustice can not be sustained upon any principle known "to the law. It is repugnant to our form of government "and out of harmony with the genius of our free institu- "tions. The legislature can not give to one party in litiga- "tion such privileges as will arm him with special and im- "portant pecuniary advantages over his antagonist. The "genius, the nature and the spirit of our State govern- "ment amount to a prohibition of such acts of legislation, "and the general principles of law and reason forbid them. "(Durkee vs. City of Janesville, 28 Wis., pp. 464-468; Cal- "der vs. Bull, 3 Dall., pp. 387-388.) Here the legislature "has granted special advantages to one class at the ex- "pense and to the detriment of another, and has under- "taken to make the courts themselves the active agents to

"this injustice, and to force them to impose penalties "in the disguise of costs upon railroad companies for sim- "ply exercising, in certain cases, the common right of "every person to make a defense in the courts when suits "are brought against them."

We quote from the recent case of Joliffe vs. Brown, Supreme Court of Washington, March 2, 1896, Vol. 3, N. S., A. and E. R. R. Cases, p 254:

"It is next contended that section 4 of the act, which is "as follows: 'In all actions for injury to stock by collision "with moving railway trains where the plaintiff shall re- "cover, and in actions to recover a penalty under this act "in which the plaintiff shall recover judgment, the judge "shall allow a reasonable attorney's fee, to be taxed as a "part of the costs,' is invalid, on the ground of its being an "attempt to grant special privileges and advantages to "one class of litigants at the expense and to the detriment "of another. Legislation requiring railroad companies to "pay an attorney's fee in case of litigating such claims "unsuccessfully, where none was imposed upon the plain- "tiff if unsuccessful, has been sustained in some instances, "and generally upon the ground that it was in the nature "of a penalty for failure to perform a duty imposed by "statute. See Railroad Co. vs. Crider, 91 Tenn., p. 489, "Am. and Eng. R. Cas., p. 157; Railway Co. vs. Ellis, "(Texas), 18 S. W., p. 723; Railway Co. vs. Prior, 34 Fla., p. "271. It can not be sustained here as a penalty, for, as "has been said, there was no duty to fence imposed by "statute, and the provision requiring the notice to be "given can not be sustained in the unlimited manner in "which the power was sought to be exercised as expressed "in the section.

"There is a broad distinction to be recognized between "legislation requiring a party to pay actual damages oc- "casioned, and that which would impose a penalty in addi- "tion thereto. Such legislation can be sustained only "where the party on whom the penalty is imposed is in

" fault or guilty of a wrong. Considered as an attorney's " fee purely and simply, it distinguishes between classes " of persons and not as to subjects of litigation or classes " of controversies, and by the weight of authority has been " held to be unconstitutional. Railway Co. vs. Outcalt, " supra; Railway Co. vs. Williams, 49 Ark., p. 492, 31 Am. " and Eng. R. Cas., p. 555; Railway Co. vs. Morris, 65 Ala., " p. 193; Wilder vs. Railway Co., 70 Mich., p. 382; 35 Am. " and Eng. R. Cas., p. 162; Railway Co. vs. Moss, 80 Miss., " p. 641, 20 Am. and Eng R. Cases, p. 555."

It is stated in the opinion of the Commission of Appeals " that the business of a common carrier is referred to as re- " quiring special statutory regulations," which is admitted, but it is not perceived in what respect the rights and obligations of a common carrier arise in respect to the killing of an animal on a railroad track by an engine. It could be as well said in a suit against a doctor whose buggy had run over a cow, that the practice of medicine requires special statutory regulations.

We have undertaken to show that in prescribing special regulations, whether it be for the common carrier, the farmer, the doctor, or the mechanic, the legislation must be based on something that is peculiar to the given calling, and which does not exist in any or all other callings.

This distinction is recognized by the Constitution of Texas, which enjoins upon the legislature the duty of seeing that common carriers do not discriminate or charge exorbitant rates, but there is nothing in the Constitution which suggests the idea of discriminatory legislation against such carriers in respect to litigation in the courts where "common" justice suggests that they should stand on the same plane with all other litigants.

It is also stated in the opinion that laws may be extended to all citizens or be confined to a particular class,

as for example, bankers, miners, traders and the like. Granted—*provided* such laws be confined to something which *makes* the banker, the miner or the trader as distinguished from other classes. A statute which prescribes the quality of air or food which the banker may consume, without making a similar provision in regard to all other consumers of the same articles, is not constitutional legislation.

While it is true that the legislature in case of a minor can prescribe all needful regulations for the protection of youthful indiscretion, yet we do not think that a statute allowing attorney's fees in all suits against the estate of a minor, without making a similar provision in regard to suits against other estates or individuals generally would be a valid exercise of legislative power. The distinction contended for is well illustrated in the case of a lawyer; in all matters pertaining to the discharge of his duty as a lawyer he is subject to the summary jurisdiction of the court in which he practices; but he can not be held in such proceeding, for the commission of an act in no way connected with his calling as a lawyer, such as publishing in a newspaper, of which he is the editor, an article reflecting on the judge of the court concerning the conduct of the judge in the trial of a case. (Ex-Parte Steinman, 95 Pa. St., p. 220.)

It is competent for the legislature to make regulations for the protection of those engaged in mining and manufacturing by prescribing that proper and necessary precautions be taken for the protection of life in a dangerous business. But, as we have seen, it is not competent for the legislature to prescribe special regulations governing the contract between persons engaged in mining or manufacturing and their employes, or to prescribe special regu-

lations governing the payment of such employes, or the terms upon which such employers shall sell goods to such employes. It is undoubtedly in the power of the legislature to make regulations concerning the law of libel and damages recoverable therefor, but it can not confine such regulations to publishers of newspapers only. It is competent for the legislature to regulate the recovery of damages on account of defects in streets, but it can not exempt from the regulations prescribed any class of persons. The legislature certainly has large and extensive powers over the subject of taxation, but it can not establish a rule of taxation in regard to a particular class of people, which is not applicable to other classes under exactly the same circumstances.

So Sunday laws are generally held constitutional, but the legislature may not make a Sunday law applying to bakers or barbers only.

The legislature may regulate the use of buildings in cities for laundries, but it can not distinguish between that class who can obtain permits from the city authorities and that class which can not. (Yick Woo vs. Hopkins, 118 U. S.)

The legislature may undoubtedly regulate the occupation of a farmer. We think it would be reasonable to prescribe that where growing crops are mortgaged, after the same are gathered the farmer shall not remove the same without giving specified notice to the mortgagee, or in case of livestock where mortgaged, that the same shall not be driven from the range by the mortgagor without giving specified notice to the mortgagee, because this would be a regulation on a subject which distinguishes the farmer and stock raiser from others, and naturally

could not be made to apply to bankers and traders, but we do not think that a statute directing that in any suit on a mortgage against any farmer or stock raiser an attorney's fee shall be allowed, without permitting such a fee in suits on mortgages generally, would be a constitutional exercise of legislative power.

Then, what is there in the collection of debts and damages from railway companies which distinguishes them in that respect from all others and justifies special legislation, not extending to all others under similar circumstances? It is true that it is the legal and moral duty of railway companies to promptly pay their debts, and promptly repair injuries wrongfully or negligently committed. This is a duty which they owe in common with every citizen of the State. It may be urged that they are slow in making payment, but it may be replied that there are thousands of others equally as slow, many who never pay at all.

The statutes of Mississippi, Alabama and Arkansas allowed attorney's fees in case of an unsuccessful appeal from the award of arbitrators or the judgment of a court, while the Texas statute constitutes the claimant the court or arbitrator, allows him to assess the damages and provides a penalty in the event the railway company shall appeal from the plaintiff's assessment to the courts, and shall there fail to reduce the amount. In the event the railway company is successful no provision is made for allowing any attorney's fees to it. The statute is extremely objectionable, for the reason that it is an incentive to juries to allow the plaintiff the full amount claimed, no matter how unreasonable his assessment of damages may be, for unless they allow him the full amount, the jury would perceive that they could not give their neighbor the attorney's fee. Aside from this partial and

discriminatory character in being confined to certain cases in which railway companies are defendants, it is highly partial and discriminatory as between plaintiffs in different classes of claims, in this: That it allows attorney's fees only in certain specified causes, where the amount does not exceed $50.00, thus discriminating against that class of suitors whose claims may exceed $50.00; and again, it allows no fee in actions for debt except for personal services.

In the opinion of the Commission of Appeals it is said:

"It has been held in this State that it is the statutory "duty of a railroad to fence its track in those places "where it can properly be done. Railway vs. Cock, 64 "Texas, p. 151; Railway Co. vs. Dunham, 68 Texas, p. "261. Such being the construction of our statute (Arti- "cle 4245), this duty may be enforced by the penalty pre "scribed in the act assailed in this case providing for the "assessment of reasonable attorney's fees against the "company if the claim for the stock killed be established "as therein provided, by judgment. A similar statute "was held to be valid on this ground in the State of Illi- "nois. Railway vs. Duggan, 109 Ill., p. 538. There is "nothing to show that the stock killed, on which the "claim in this case is founded, was not killed on the rail- "road at a point where it was not fenced." (Printed Record, p. 12.)

In respect to this position we quote from what we said in the argument on motion for rehearing in the Supreme Court of Texas:

"2d. It it stated in substance, in the opinion, that the "act can be maintained in this particular case as a pen- "alty upon the railway company for failure to fence its "track. It is conceded in appellant's brief that, if such "were really the object and intention of the law, that it "would be constitutional, and the authority to which the "opinion refers was cited by the appellant; but it was

"submitted by the appellant that such was not in fact "the object or intention of the law, which position is in no "way responded to by the opinion. In other words, the "opinion concerns itself in establishing a principle which "is admitted in the appellant's brief, and entirely omits "to consider that part of the appellant's argument which "shows that the case does not call for its application. "The court discusses what is conceded, but entirely over- "looks the point presented for decision.

"We think it is manifest, from an inspection of this act, "that it was not intended as a penalty to induce railway "companies to fence their tracks. In the first place, such "penalty was already prescribed by a statute making them "absolutely liable for stock killed or injured where the "track was not fenced. (Revised Statutes of Texas, of "1879, Article 4245.) It is not to be presumed that the "legislature, after having once legislated upon a particu- "lar subject, intended to again legislate upon the same "subject in a general act, where there is nothing in the "general act to indicate that there was any purpose to "make it apply to such particular subject already covered "by legislation. There is not the remotest reference in "the act to the question of fencing. It is not provided "that the railway company may escape the payment of "the attorney's fee by fencing its road. It might fence "every inch of its road, which could be fenced, and it "would still be liable, under this act, where animals are "killed at points where fencing is not permissible, or "which, without fault of the railway company, broke "through the fence and were killed.

"In Bielenberg vs. M. U. R. Co. (Mont.), 38 A. & E. R. "R. Cases, where a statute, creating absolute liability on "railways for stock killed, was held unconstitutional, it "was decided that the court could not so construe the "statute as to make killing *prima facie* evidence of negli- "gence to which extent it would be constitutional, as "there was nothing on the face of the act to indicate that "the legislature intended to accomplish that end.

"Again, the act is not confined to stock cases, but pur- "ports to be an act to regulate the collection of claims "for personal services, or labor, or for damages, or for

"overcharge on freight, and applies to all character of "claims for damages, as well as to the classes of claims "specified in the act.

"We believe that no one can read this act and conclude "that there existed, in the legislative mind, any considera- "tion whatever of the fencing of the railroads, but that it "was intended purely as a penalty for the failure of rail- "way corporations to pay certain claims within thirty "days or for resorting to the courts. Moreover, there is "nothing in the record to show that the road, at the place "where the animal was killed, was not fenced, or that it "was killed at a point where the railway company could "have lawfully fenced. The opinion says that it does not "appear that there is anything to show that the stock "was not killed at a point where the railroad was not "fenced. This is reversing the almost universal rule of "law that a party is presumed to be innocent until proven "guilty, and that negligence or a failure of duty is not "presumed, and that the burden is on him who claims the "penalty to plead and prove the facts which entitle him "to the same. (Murray vs. G., C. & S. F., 63 Texas, p. 413, "and cases there cited.)

"In the case of Texas Central Railway vs. Childress, 64 "Texas, p. 346, it is held that it is incumbent on the rail- "way company to prove that the railway was fenced, but "it was decided, on the peculiar phraseology of the "statute, then under consideration, and an examination "of the opinion in that case, in connection with the stat- "ute passed upon, will show that it has no application to "the statute now under consideration."

THE OPINION OF THE COURT OF CIVIL APPEALS.

In this opinion on the supposed fence question it is said:

"In most of the cases where a penalty is allowed— "double damages or attorney's fees—the railroad com- "pany is made liable upon condition that it has failed to "fence its road, and the right of the legislature to act "is referred to its police power. We are not prepared to

"say that the failure to fence under such statutes may "not serve as a sufficient reason why the law would be "valid, but the right of the legislature to act is based "upon a principle deeper than the mere failure to fence "the road. It lies in the fact that the public are inter- "ested in having protection against the hazardous busi- "ness of railroads; human life is endangered by great "power and force employed in the business. Railroads "are public carriers, carriers of pasengers, whose safety "depends upon the care exercised by the company's em- "ployes in operating this force. A collision of a passen- "ger train with an animal of insignificant value might be "attended with shocking results in loss of human life. A "statute that would stimulate those engaged in such busi- "ness to greater care would not be without legal founda- "tion, whether it be accomplished by penalty or by requir- "ing the road to be fenced." (Printed Record, pp. 19-20.)

We can not construe this language as a distinct holding that the statute has any connection with the fencing of the railroad or was so intended by the legislature. If so, in response thereto we here insert what we said in our printed argument filed in the Supreme Court: "The po- "sition taken in the former argument to the effect that "there is nothing in the act to indicate that the legisla- "tive mind in adopting it ever dreamed of such an idea or "considered it in the remotest way, is not referred to in "the opinion (of the Court of Civil Appeals).

"The case of Bielenberg vs. Railway Company, cited in "the former argument, which holds that where an act is "unconstitutional on its face for the purpose for which the "legislature intended it, the court can not hold it con- "stitutional by giving it a construction and effect not in- "tended by the legislature, is followed by the case of "Cottrell vs. Union Pacific Railway company (Supreme "Court of Idaho), 21 Pac. Rep., p. 416, where, after hold- "ing that the act which imposed absolute liability for ca- "tle killed was unconstitutional, the court said:

"'It is contended that the statute should be construed "so that it may establish a rule of *prima facie* evidence "of negligence. Such construction of the statute does

"not seem to us a fair one. The language is plain, and "it was clearly the intention of the legislature to make "the killing of the animal by the railroad company the "only test of its liability. To do this, in our opinion, "would be an act of great injustice and would be a clear "violation of the Constitution. It is with great reluctance "that we pass upon this statute and we would not do so "if it were possible to dispose of the case justly upon any "other basis; but the refusal to charge as requested, and "the overruling of defendant's demurrer can be upheld on "no other ground than upon the existence of this statute, "for, in the absence of the statute both rulings are mani-"festly error. A statute of this character, one precisely "similar to the one in question, has lately been passed "upon by the Supreme Court of Montana in the case of "Bielenberg vs. Railway Company, 20 Pac. Rep., p. 314. "The court has declared such an act unconstitutional. "We are inclined to follow the decision of that court. The "judgment and order appealed from are, therefore, re-"versed and a new trial granted.' (p. 417.)

"Nor is the position in the former argument that there "is nothing in the record to show that the defendant had "failed in any duty to fence the track, and that if the "suit could be sustained on the theory last suggested, that "the burden was on the plaintiff to allege and prove such "failure, responded to by the Court of Civil Appeals.

"The case of Railway vs. Warrington, 92 Ills., which is "twice cited by the Court of Civil Appeals, sustains this "proposition.

"Nor is the fact that the act provides no remedy for "escaping the payment of the penalty by fencing noticed "by the Court of Civil Appeals.

"The act is not confined to cases where cattle are killed "at points where the railroad could have fenced but did "not, but is equally applicable in its terms to cattle killed "at public crossings, at depots in cities and towns, and "other places where the railroads are exempted or pro-

"hibited from fencing, and, moreover, it applies to all "character of damage claims against railroads, provided "the amount be not over $50.00.

"Moreover, is it not a rather violent assumption on the "part of the Court of Civil Appeals that the purpose of the "act was to promote fencing when there is nothing in the "act itself to indicate such purpose, and the statute im- "posing absolute liability for the stock killed where the "railroad has failed to fence, and the payment of thous- "ands of dollars each year for cattle killed, already ex- "isted as an incentive to fence?

"The court says: 'The collision of a passenger train "with an animal of insignificant value might be attended "with shocking results in the loss of human life.'

"Now, if regard for human life, and knowing that such "a collision would not only result in the damage or de- "struction of its property to the extent probably of thou- "sands of dollars and the payment of large sums of money "as damages for injuries to passengers and to the relatives "of those killed, are not sufficient inducements to the rail- "way company to exercise care, is it not chimerical and "the heighth of fancy to assume that the imposition of "$10.00 in addition to the value of the animal would cause "the exercise of any higher degree of diligence?

"Where an engineer knows that in case of a wreck "caused by a collision with an animal on the track that he "and his fireman, of all others, would be in the position "of greatest danger, and that in all probability he would "lose his life or sustain serious bodily injury, with such in- "ducements to exercise care, is it reasonable to suppose "that knowledge of the fact that in case of a collision the "railway company would have to pay $10.00 in addition "to the trifling value of the animal, would cause him to ex- "ercise any greater care?

"Where a partial law discriminating against a class is "sought to be sustained it should be upon reasons readily

"apparent which distinguish such class in the particular "subject matter from the body of the people, and the "courts should not go into the domain of fancy to find "doubtful pretenses for sustaining such a law. If they "do, then some specious pretext can be found or imagined "to justify partial and discriminatory legislation directed "at any particular class and the value of the constitu- "tional guarantee will be greatly impaired. When a law "on its face appears to be unconstitutional is it right for "the court to look for some possible good result which "might follow its enforcement but which was never in the "contemplation of the legislature and hold the law con- "stitutional on such speculative ground? For the pur- "pose intended by the legislature the act is void. Will "the court say, well there may be another speculative pur- "pose which this act may accomplish, and though there "is nothing it is context to show that the legislature in- "tended it for such purpose, yet, rather than hold it un- "constitutional we will reform it by inserting therein a "provision that when the railroad has fenced its road the "act shall not apply. In other words, to hold the law con- "stitutional, we will make a different law from the one "the legislature has attempted to make. Can this be pro- "perly done?

"In Baldwin vs. Franks, 120 U. S., p. 678, it was decided "that as a statute on the subject of a conspiracy was un- "constitutional as applied to conspiracies against citizens "of the State it could not be enforced as to conspiracies "against aliens, although if the statute in its terms had "been confined to conspiracies against aliens only, it "would have been constitutional.

"The court said: 'In support of this argument reliance "is had on a well settled rule that a statute may be in part "constitutional and in part unconstitutional, and under "some circumstances the part which is constitutional will "be enforced and only that which is unconstitutional re- "jected. To give effect to this rule, however, the parts "of that which are unconstitutional and the parts that "are constitutional must be capable of separation, so that "each may be read by itself. * * * The limitation

" which is sought must be made, if at all, by construction,
" not by separation. This, it has often been decided, is
" not enough.

" ' Thus in the United States vs. Reese, 92 U. S., p. 214,
" the indictment was against two of the inspectors of a
" municipal election in Kentucky, under sections 3 and 4,
" of the act of May 11, Chap. 114, 16 Stat., p. 140, which
" provided in general terms for the punishment of inspect-
" ors who should wrongfully refuse to receive the vote of
" a citizen when presented under certain circumstances,
" and for the punishment of those who by unlawful means
" hindered or delayed any citizens from doing any act re-
" quired to be done to qualify him to vote or from voting
" at any election. There was nothing in either of the
" sections to limit their operation to a refusal or hindrance
" ' on account of the race, color, or previous condition
" of servitude' of the voter, and it was held that they were
" unconstitutional because on their face they were broad
" enough to cover wrongful acts without as well as within
" the constitutional power of congress. An attempt was
" made there, as here, to limit the statute, by construction,
" so as to make it operate only on that which congress
" might rightfully prohibit and punish; but to this the
" court said, p. 221: ' For this purpose we must take these
" sections of the statute as they are. We are not able to
" reject a part which is unconstitutional and retain the re-
" mainder, because it is not possible to separate that which
" is unconstitutional, if there be any such, from that which
" is not. The proposed effect is not to be attained by
" striking out or disregarding words that are in the sec-
" tion, but by inserting those that are not now there. Each
" of the sections must stand as a whole or fall together.
" The language is plain. There is no room for construc-
" tion, unless it be as to the effect of the Constitution. The
" question then to be determined is whether we can intro-
" duce words of limitation into a penal statute so as to
" make it specific, when, as expressed, it is general only.'
" This was answered in the negative, the court remarking:
" ' To limit the statute in the manner now asked for would
" be to make a new law, not to enforce the old one.' "

" The court then referred to the trademark cases, 100

"U. S., p. 82, and the Virginia bond cases, 104 U. S., pp. "269-305, as sustaining the same rules. The trademark "cases are in apt illustration of the principle. There the "act of congress, which it was claimed would have been "valid as a regulation of commerce with foreign nations "and among the States, was held void, be- "cause it embraced all commerce, including that between "citizens of the same State, which was not within the "jurisdiction of congress, and its language could not be "restrained to that which was subject to the control of "congress. The court said: 'If we should, in the case "before us, undertake to make by judicial construction a "law which congress did not make, it is quite probable "that we would do what, if the matter were now before "that body, it would be unwilling to do.'

"It is stated in the opinion of the Court of Civil Ap- "peals that the case of Railway Company vs. Warring- "ton, 92 Ills., p. 157, overruled Railway Company vs. Batie, "6 Nebr., p. 37. We think this is a mistake. It is true "that the court in the Warrington case refers to the Batie "case as being in conflict with its opinion, but an exam- "ination of the case will show that it is not.

"As before stated, the statute in question in the Batie "case had no reference to the question of fencing, and the "decision was that the legislature could not impose a pen- "alty on a particular class of citizens or corporations "for failure to pay demands in thirty days, when such "a penalty was not imposed on others who were guilty "of similar offenses.

"The Warrington case involved a statute which re- "quired railway companies to fence their tracks, and pro- "vided that in the event of a failure to do so, they should "be liable for double damages for stock killed, and the "court sustained the latter feature of the law on the "ground that it was a police regulation to compel rail- "roads to fence their tracks for the protection of life and "property, and double damages were given as a remedy "to enforce the performance of the duty on the same prin-

"ciple that some statutes, particularly in England, give a "part or the whole of a penalty or fine prescribed for "breach of public acts to the informer as an incentive to "individuals to aid the government in the enforcement "of law."

We will now review the remaining cases cited by the Court of Civil Appeals.

In Barbier vs. Connolly, 113 U. S., an ordinance of the city of San Francisco prohibiting laundries from running between the hours of 10 p. m. and 6 a. m. was sustained on the theory that it was adopted as a police regulation to prevent the danger of fires. The opinion is quoted in the argument of plaintiff in error supra where it is claimed that the principles enunciated support its contention.

Railway Company vs. Beckwith, 129 U. S., p. 26, involved a statute imposing double damages for killing stock by railway companies when failing to fence, and the statute was sustained on the same grounds as those above stated with reference to the Warrington case.

Railway Company vs. Humes, 115 U. S., p. 512, and Humes vs. Railway Company, 82 Mo., p. 224; Wilder vs. Maine Central Railway, 65 Maine, p. 338; Railway Company vs. Riblet, 66 Pennsylvania, p. 166; Spealman vs. Railway, 71 Mo., p. 134, and Railway Company vs. Duggan, 109 Ills., p. 537, were all cases providing for double damages or absolute liability or attorney's fees where railway companies, when required to do so, had failed to fence their tracks, and are decided on the ground before indicated.

Welch vs. Chicago, etc., Railway Company, 53 Ia., p. 632, also involved a double damage act for failure to fence.

The constitutionality of the act is decided by a reference to the previous case of Jones vs. Galena, etc., Railway Company, 16 Ia., p. 6. In that case the statute was attacked solely on the ground that it violated the provision of the Constitution that all laws of a general nature should have uniform operation. The case was correctly decided, although the particular ground on which the statute was a valid exercise of legislative power, before referred to, was not mentioned.

Illinois Central Railway vs. Crider, 19 S. W., p. 618, considered an act requiring section foremen to give notice of injuries to live stock and to have their value appraised, and making a railway company liable where the track was not fenced. It was held that the appraisement was only *prima facie* evidence and the act was constitutional, because the duty to fence was imposed not so much in the interest of the owners of the stock as in the interest of the public who are concerned that accidents should be avoided and travel made as safe as possible.

"Many of these objections are predicated upon the as-
"sumption that the statute *is a mere piece of machinery*
"*for the more speedy collection of live stock claims against*
"*railroads. If this view of the act be the true one, then it*
"*does present many serious questions of constitutional law.*
"In our judgment the act has a wider purpose, and rests
"upon much higher and broader consideration. The end
"sought by this legislation is the prevention of accidents
"on railroads, by compelling the inclosure of the track
"in such manner as will prevent live stock from going on
"the roads. Failure to fence is made conclusive evi-
"dence of negligence whenever live stock is killed or in-
"jured upon such an unfenced road by moving engines or
"cars. The liability of the company for actual damages
"is made the consequence of the failure to fence; and if
"the offending company refuses to pay the *prima*
"*facie* value of such stock as ascertained in the mode pre-

"scribed by the act, then it is made liable for an increase "in the damages to the extent of reasonable attorney's "fee in the event it shall unsuccessfully litigate its liabil- "ity for such *prima facie* value. The duty of fencing and "the resulting liability for failure to perform such duty "is imposed, not so much in the interest of the owner of "the animals which may go upon an unfenced road, *as in* "*the interest of the general public*, who are concerned that "accident shall be avoided, and public travel be made as "safe as the exigencies of that manner of transportation "will permit. The authority for requiring railroads to "fence in their tracks is found in the general police power "of the State. The duty may be imposed by an affirmative "statute and enforced by fines, forfeitures and penalties; "or it may be indirectly imposed, as in the act under con- "sideration, by subjecting unfenced roads to liabilities "and penalties from which raods recognizing the duty "are exonerated." (19 S. W Rep., pp. 619-20.)

It is submitted that, as elsewhere suggested, the only intelligent construction of the Texas act is *that it is a mere piece of machinery for the more speedy* collection of live stock and other claims not exceeding $50.00 against railroads.

Railway vs. Mackey, 127 U. S., p. 205, held valid a statute changing the fellow servant law between railroads and their employes, for the reason that the business of railroading is peculiarly hazardous, and the same dangers do not exist in other employments, and hence, that this peculiarly dangerous employment distinguished it from others, and justified legislation peculiar to it. The case is quoted in this argument supra, in the belief that the principles announced in the opinion sustain the position of the plaintiff in error.

Budd vs. New York, 143 U. S., p. 517, holds that the legislature may regulate the charges of public elevators on

the same principle that it may regulate the charges of common carriers, and holds that such legislation in New York may be confined to cities having more than 130,000 population.

As to the first branch of the case, we fail to see the remotest application to this case. As to that part of the case which holds that regulation may be confined to cities having more than 130,000 inhabitants, it has always been held that in the absence of some constitutional prohibition against local or special laws, a statute may be confined to a particular territory so long as it acts equally on all those within the particular territory, and furthermore it is notorious that the circumstances and conditions surrounding business of this character in the larger cities are different from those which pevail in towns and villages.

No one would doubt that the legislature of Texas could regulate or authorize the regulation of hack fares in large cities without applying such regulation all over the State. But here the railway company *in every city and in every county* is required to pay a penalty for not discharging a demand within thirty days or a penalty for exercising the right to defend a suit in the courts of the country, while all others in the same situation *in every city and in every county* are excused therefrom.

Railway Company vs Harry, 63 Texas, p. 256, and Railway Company vs. Dwyer, 75 Texas, p. 580, sustained an act which gave the shipper a penalty or exemplary damages as a remedy for forcing a railroad to comply with its contract by delivering freight at the rate contracted for, being an appropriate exercise of the legislative power to regulate charges of railroads and prevent overcharges and extortion.

The statute involved in those cases was not attacked on the ground that it did not apply to all common carriers, and if such attack had been made it would probably have been sufficiently answered by the suggestion that railroads as common carriers are distinguished from other common carriers by the fact that they derive franchises from the State and exercise the State's right of eminent domain and enjoy practically a monopoly, while carriers by land and water have received no franchises from the State, and the routes they traverse are open to competition of all comers.

Railway Company vs. State, 61 Texas, p. 343, involved a penalty imposed on railroads for failure to make a report to the State comptroller, a proper requirement to enable the State to intelligently exercise the right of regulation of railroads in their relation of common carriers to the public.

Moreover, it is expressly stated in the opinion that no constitutional question was raised.

We fail to see the analogy between this case and any of the Texas cases referred to in the opinion of the Court of Civil Appeals.

Crowin vs. Ward, 35 Cal., p. 190, sustained a statute allowing an assessment of 5 per cent. damages as costs against all unsuccessful litigants in the courts of San Francisco which operated on all suitors alike and suggested no discrimination. As long as the legislature was permitted by the Constitution to legislate in a part of the territory of the State without making the particular enactment apply to the whole State there is no ground on which unconstitutionality of the act could be urged.

Rodemacher vs. Railway Company, 41 Iowa, p. 300, involved an act imposing absolute liability on railroads

for fires. The act was attacked on the sole ground that it impaired the obligation of a contract and the questions presented in this case are not referred to.

See comments on similar case, supra, page —.

Shaffert & Munn vs. Mining Company, 55 Md., p. 74, maintained the constitutionality of a statute (when applied to a particular company) prohibiting mining companies from paying employes except in money on the sole and exclusive ground that the charter of the particular company contained a provision reserving the right to alter or amend the same at pleasure of the legislature.

Whether the decision be right or wrong, viewed with reference to the ground upon which it was made, it has no application to the present case, for it has been held that the plaintiff in error is protected by the constitutional guarantees. G., C. & S. F. vs. Ellis, 70 Texas, p. 307; G., C. & S. F. vs. Rowland, 70 Texas, p. 298; Reagan vs. Trust Companies, 154 U. S., pp. 420-362.

State vs. Stephenson and State vs. French, 109 N. C., deal with the right of the State to classify occupations for the purpose of assessing occupation or license taxes. The act there in question was attacked principally on the ground that it was a regulation of interstate commerce and it does not appear from the report of the cases in the S. E. Rep. that there was any complaint made that it embraced any discrimination between different occupations or was not based on features which clearly distinguished them from each other.

In re Oberg, 28 Pac. Rep., p. 130, a statute exempting seamen from arrest or imprisonment in actions for debt was held valid on the ground that the object of the act was to aid and extend foreign commerce with Oregon by

protecting sailors and preventing such burdens or exaction from being laid upon shipping as would discourage vessels from frequenting her ports. "The persuading of "sailors to desert, or harboring them after they had de- "serted, or demanding from them sums as blood money, "or arresting them for small debts, or on frivolous pre- "tenses of debt, are all acts which must affect injuriously "the prosperity and welfare of our people."

These are certainly considerations which distinguish the sailor as a class in the matter in question and probably justified the enactment in his favor on the same principle that members of legislative bodies are exempt from civil process while in the discharge of their duties, and on the same principle that an act exempting soldiers from such service while in the active service of the country would be unimpeachable. But if the act had exempted merchants while leaving farmers subject to it or, *vice versa*, the question presented would have been very different.

State vs. Loomis, Division No. 2, Supreme Court of Missouri, 20 S. W. Rep., p. 332, involved the constitutionality of an act which was intended to prevent employers engaged in mining and manufacturing from giving to their employes in payment or part payment of wages orders on what were called "truck stores."

The opinion delivered by Thomas, J., sustained the constitutionality of the law. We think the greater part of the opinion is opposed to weight of authority, and yet in the latter part of the same Thomas, J., appears to recognize the principle for which we contend and to try to bring the case within it. He said: "It seems that the truck sys- "tem is peculiar to the operation of mines and factories."

McFarland, J. concurred in the result and Gantt, P. J., expressed no opinion.

Since the opinion of the Court of Civil Appeals in this case was rendered, State vs. Loomis, has been decided by the Supreme Court of Missouri, and the act in question held to be void under the due process clause of the State and Federal Constitution. See the case quoted in this argument, supra.

Lewis vs. Webb, 2 Maine, p. 320, holds that special acts granting new trials are unconstitutional, and Baggs' Appeal, 43 Pa. St., p. 512, holds that a special act requiring a receiver in the orphans' court is unconstitutional.

The remaining cases cited by the Court of Civil Appeals have been heretofore quoted by the plaintiff in error in the belief that they support its position.

The Court of Civil Appeals quoted from Judge Cooley to the effect that the legislature may legislate in respect to classes, but failed to state qualifications of the doctrine contained in his Constitutional Limitations, which we now quote, and do not desire any better statement of the principles for which we contend.

" The doubt might also arise whether *a regulation made* " *for any one class of citizens*, entirely arbitrary in its char- " acter and restricting their rights, privileges or legal ca- " pacities, in a manner before unknown to the law, would " be sustained, notwithstanding its generality. Distinc- " tion in these respects must rest upon some reason upon " which they can be defended, like the want of capacity " in infants and insane persons, and if the legislature " should undertake to provide *that persons* following some " specified lawful trade or employment should " not have capacity to make contracts, or to " receive conveyances, or to build such houses " as others were allowed to erect, or in any " other way to make such use of their property as was " permissible to others, it can scarcely be doubted that the

"act would transcend the due bounds of legislative power, "even though no express constitutional provision could be "pointed out with which it would conflict. *To forbid a* "*class* the right to the acquisition or enjoyment of prop- "erty in such a manner as should be permitted to the com- "munity at large would be to deprive them of liberty in "particulars of primary importance to their pursuit of "happiness, and those who claim the right to do so ought "to be able to show *a specific authority therefor*, instead of "calling upon others to show how and where the author- "ity is negatived." (Cooley Const. Lim., p. 393 (390.)

The Court of Civil Appeals said: "No one doubts that "a statute discriminating among persons of the same "class or locality would be invalid. The legislature can "not select one of a class, one merchant, one railroad, one "bank or one person and prescribe burdensome rules for "his or their government that would not apply to all of the "same class and in the same condition."

If discriminatory regulation is sustained as constitutional until it reaches the point where it selects one individual for regulation, then constitutional restraints on the power of the legislature are of little value.

If the individual to be protected by the Constitution must separate himself from his class and get off into a corner, occasions on which he can appeal to the Constitution will probably be rare.

Suppose the legislature should partially revive the Curfew by enacting that all doctors, lawyers and bakers caught out between 8 p. m. and 5 a. m. shall be fined $25.00 a head. This law would apply to all of a class, indeed to all of three classes. In the language of the Court of Civil Appeals it would "classify the citizens of the State ac- "cording to their occupations." "All railroads (doctors,

"lawyers and bakers) are included in the act under con-
"sideration. There is (are) no other occupation (s) that
"can be similarly situated." Our proposed Curfew law would in one sense embrace all who came under the sphere of its operation, viz., every fellow who happened to be a lawyer, a doctor or a baker found roaming at large at night would be subject to the fine. Now butchers are not bakers and because this law is applied to bakers is no reason why it should apply to butchers. Our legislature has power "to classify the citizens of the "State according to their occupations." Now if our suggested Curfew law would be constitutional, then we admit that here we have no case; but if the court would hold our Curfew law directed at doctors, lawyers and bakers only invalid then, we think, the court should hold this act invalid. If the legislature can not prohibit one class of citizens from walking abroad at night, without paying $25.00 for the privilege, on what principle can it prohibit one class of citizens from refusing to voluntarily pay demands under penalty, if unsuccessful in a defense thereto in court, of paying a fine called attorney's fee of $10.00?

Suppose the legislature should enact that all persons and corporations engaged in the wholesale dry goods business in the State who failed to pay their bills within thirty days after being presented, should be liable to a penalty of 20 per cent., would the act be constitutional? Under the reasoning of the Court of Civil Appeals, why not?

The wholesale dry goods merchants constitute a class and the act would operate equally and uniformly on all of that class and it would effect all alike in the sphere of its operation, similarly situated, that is, engaged in the dry goods business. Then in respect to manner of paying debts what is there that distinguishes railroads as a class from dry goods merchants as a class? If the legislature

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can make special regulations for the collection of debt from one class, why is it not allowed to do so for the collection of debts from the other class.

If it be assumed that the railroads are less prompt in the payment of their obligations, then we deny the truth of the assumption, and assert that all demands against railroads are discharged with as much promptness as the average citizen does his.

THE OPINION OF THE SUPREME COURT.

In this opinion it is said:

"Statutes permitting the recovery of attorney's fees in "suits for the value of stock killed by railroad companies "have been held by the courts of many of the States to "be valid. (Peoria D. and E. Ry. Co. vs. Duggan, 109 Ill., "p. 537; Perkins vs. St. Louis and Iron Mountain Ry. Co., "15 S. W. Rep., p. 320.)

"It is true that in some of the cases, and we believe the "greater number of them, the courts have sought to jus- "tify the exercise of this power as being a penalty to en- "force the statutory duty to fence the tracks of railroads. "Counsel for plaintiff in error seems to admit that upon "this ground the statute might be sustained, but we can "not see that it is necessary to assign any particular "reason for the exercise of constitutional power by a leg- "islative body." (Printed Record, p. 28.)

From what has preceded it is plain that the court was mistaken in the statement that counsel for plaintiff in error seems to admit that upon this ground the statute might be sustained. The Supreme Court, however, from whose judgment and opinion this writ of error is prosecuted, having disclaimed any intention of placing the decision on the fencing ground, we think that question can properly be eliminated from further consideration by your Honors.

In support of its opinion the Supreme Court relied upon the following cases:

Insurance Co. vs. Chowning, 86 Texas, p. 654, in which the opinion was delivered on the same day as the opinion in this case.

Dow vs. Beidleman, 49 Ark., p. 455.

Burlington, etc., Rld. Co. vs. Dey, 45 A. & E. R. R. Cases, p. 408.

Wortman vs. Kleinschmidt, 30 Pac. Rep., p. 280.

In the case of Dow vs. Beidleman, the statute in question authorized the recovery of a penalty and attorney's fees from a railroad company guilty of extortion in charging passenger fares at a greater rate than that allowed by law. The attorney's fee was sustained merely as a part of the penalty. The court said:

"The attorney's fee is a part of the penalty denounced "for the willful violation of the provisions of the act, and "stands upon the same footing as the money judgment to "be recovered. * * * * * An attor- "ney's fee may be included as a part of the penalty im- "posed for non-compliance with the duty imposed, with- "out rendering the statute obnoxious to the objection of "being partial and unequal legislation. Railway Co. vs. "Duggan, 109 Ill., p. 537; Railway Co. vs. Yanz, 16 Kan., "p. 583; Railway Co. vs. Abney, 30 Kan., p. 41, 1 Pac. Rep., "p. 385."

In Railway Co. vs. Dey, 45 A. and E. R. R. Cases, p. 408, the question was thus treated:

"Chapter 28, Acts 22d Gen. Assm., provides that when "recovery is had for its violation, attorney's fees are "ajudged against the defendant. It is insisted that a "privilege is here granted to a suitor which is withheld

"from other citizens. All citizens having litigation of "the character indicated, have equal rights to recover "attorney's fees. The legislature may prescribe the rules "permitting recovery of double damages or attorney's "fees in one class of cases, and deny it in all others. "There is no inequality therein forbidden by the constitu- "tion and laws." (p. 408.)

That is a case on account of the refusal of the railroad company to obey the joint rates fixed by the railroad commission of the State. The attorney's fee question could very well have been disposed of on the same ground as that in the Arkansas case of Dow vs. Biedleman, viz.: that the same was merely a part of the penalty for violating the statute. However this may be, from the summary manner in which the question was disposed of, the Day case is entitled to little weight as authority.

In Wortman vs. Kleinschmidt, 30 Pac. Rep., p. 280, the Supreme Court of Montana, by a majority of one, sustained the statute allowing recovery of attorney's fees, in suits foreclosing mechanic's liens. The question is thus discussed in the opinion of the majority:

"The appellants do not attack the reasonableness of "the sum of $1000 which was taxed in favor of respondent "as an attorney's fee, but insist this act is within the "prohibition of the constitution, because it punishes the "owner of property who resists in good faith the pay- "ment of an unjust or illegal claim. It is shown in the "case at bar that the respondent brought this action to "recover the sum of $14,198.50; that the verdict was for "the sum of $9113.50; and that the judgment was entered "accordingly. The jury arrived at this result by deduct- "ing from the demand of respondent the sum of $5085, "which was paid by Kleinschmidt after the commence- "ment of the action. Kleinschmidt by his pleadings and "testimony, asserted that Wortman was not entitled to "recover any amount, and that if judgment were entered

"against him the law would not authorize the creation of "a lien upon his property to secure its payment. If "Kleinschmidt had tendered to the respondent, at the "appropriate time, the sum which was due, or had con- "fessed judgment in favor of Wortman for the foreclos- "ure of his lien, the court would not have the power, un- "der the statute, to tax the attorney's fee, because the "relief sought had been obtained without a contest. If "the defendant offers at any stage of actions of this class "to allow a proper judgment to be taken against him, the "court would consider this fact in fixing the amount of "such fee. The court found against Kleinschmidt upon "these issues and we are of opinion that the legislative "assembly had the power to declare that under these cir- "cumstances a reasonable attorney's fee should be taxed "as costs."

This reasoning speaks for itself.

The dissenting opinion of De Witt J. in our judgment is more in accord with the logic of the law. He said:

"The court allowed the plaintiff an attorney's fee of "$1000. This was in pursuance of an act of the legislative "assembly, March 14, 1889, as follows: 'That there be "added to section 1394 of the 5th division of the by-laws "of Montana the following: Whenever any action or suit "is hereafter brought for the purpose of foreclosing a lien "or liens under the provisions of this act and judgment "is therein rendered for the plaintiff or any person claim- "ing or holding a lien upon any property, the court may "order and it is hereby made the duty of the judge thereof "to order that the defendant against whose property the "lien is filed shall pay as costs a reasonable attorney's fee, "to be fixed and allowed by the court and to be collected "as are other costs in the action.' Section 1394a. The ap- "pellants contend that this act of the legislature is void. "Some States have enacted laws for the allowance of at- "torney's fees to the plaintiff in an action against a rail- "road company for the killing of domestic animals. Such "law was declared to be unconstitutional in the State of

"from other citizens. All citizens having litigation of "the character indicated, have equal rights to recover "attorney's fees. The legislature may prescribe the rules "permitting recovery of double damages or attorney's "fees in one class of cases, and deny it in all others. "There is no inequality therein forbidden by the constitu- "tion and laws." (p. 408.)

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" Michigan. See Wilder vs. Railroad Co., 7 Mich., p. 382;
" 38 N. W. Rep., p. 289; Schut vs. Ry. Co., 70 Mich., p. 433,
" 38 N. W. Rep., p. 291; Rinear vs. Ry. Co., 70 Mich., p.
" 620, 38 N. W. Rep., p. 599. But laws of this nature were
" held to be constitutional in Railroad Co. vs. Duggan, 109
" Ill., p. 537; Railroad Co. vs. Moore, 16 Kans., p. 573; Per-
" kins vs. Ry. Co., 103 Mo., p. 52, 16 S. W. Rep., p. 320;
" Railroad Co. vs. Dey (Iowa), 48 N. W. Rep., p. 98. But in
" these cases the law was sustained on the ground that
" the attorney's fee in those acts was in the nature of a
" penalty against the railroad company for the disobedi-
" ence of that statute requiring them to maintain a fence
" on their right of way, but the allowance of an attorney's
" fee in an action to foreclose a mechanic's lien is not a
" penalty for the disregard of the statute and the cases
" last cited are not in point. The agreement of respondent
" that 'sufficient answer to the position of appellant,
" Kleinschmidt, is this: That if he desire to avoid the im-
" position of costs in this action he should have paid his
" honest debts,' seems to me to be of the nature of petitio
" principii, because the very question in litigation is
" whether the defendant owes the debt at all.

" The law before us not being sustainable as providing
" penalty for the disregard of the statute of the State, as
" in the cases above cited, we have simply the inquiry as
" to whether the discrimination thus given by the statute
" in favor of plaintiff and against the defendant in fore-
" closure of mechanic's lien is constitutional. The con-
" stitution provides in Section 6, Article 3, 'courts of
" justice shall be open to every person and speedy remedy
" afforded for every injury of persons, property or char-
" acter and that right and justice shall be administered
" without sale, denial or delay.' The constitution of Wis-
" consin provides (Section 9, Article 1): 'Every person
" shall have a certain remedy in the laws for all injuries
" or wrongs he may receive in his person, property or
" character; he ought to obtain justice freely and without
" being obliged to purchase it completely and without
" denial, promptly and without delay, conformable to the
" laws.' Chief Justice Dixon, of the Supreme Court of
" that State, said, in Durkee vs. City of Janesville, 28

" Wis., p. 471: 'I had occasion to express my views of the
" proper construction and effect of this section in Phelps
" vs. Rooney, 12 Wis., pp. 705-706. It is obvious there can
" be no certain remedy in the laws where the legislature
" may prescribe one rule for one suitor, or
" class of suitors, in the courts, and another
" for all others under like circumstances, or may
" discriminate between parties to the same suit, giving
" one a most unjust pecuniary advantage over the other.
" Parties thus discriminated against would not obtain
" justice freely, and without being obliged to buy justice
"and pay for it, thus making it a matter of purchase to
" those who could afford to pay, contrary to the letter and
" spirit of this provision. Certainty of remedy implies uni-
" formity of remedy and equality of rights and privileges
" in all things respecting it, which can only be obtained by
" general laws, equally binding upon every member of the
" community. The language denotes that there can be
" but one remedy for all similar cases, which must operate
" upon all persons or parties alike, and be equally free and
" favorable to all' See the review of authorities in this
" opinion. In Wilder vs. Railroad Co., 70 Mich., p. 384, 38
" N. W. Rep., p. 289, the opinion says: 'But the imposing
" of the attorney's fee of $25 as costs can not be upheld.
" The legislature can not make unjust distinctions be-
" tween classes of suitors without violating the spirit of
" the constitution. Corporations have equal rights with
" natural persons, as far as their privileges in the courts
" are concerned. They can sue and defend in all courts,
" the same as natural persons, and the law must be ad-
" ministered as to them with the same equality and justice
" which it bestows upon every suitor, and without which
" the machinery of the law becomes the engine of ty-
" ranny. This statute proposes to punish a railroad com-
" pany for defending a suit brought against it, with a
" penalty of $25, if it fails to successfully maintain its de-
" fense The individual sues for the loss of his cow, and
" it is shown that such loss was occasioned by his own
" neglect, and through no fault of the company, and he
" thereby loses his suit, the railroad can recover only the
" ordinary statutory costs of $10 in justice's court, but if
" he succeeds because of the negligence of the company,